(1)
Supreme Court, U.S.
FILED

No. _____

01 961 JAN 4 2002
OFFICE OF THE CLERK

In The Supreme Court of the United States

ELECTRIC MOTOR & SUPPLY, INCORPORATED, RALPH FORCE and CHARLES M. RHODES,

Petitioners,

v.

POTOMAC ELECTRIC POWER COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

James P. Ulwick
Counsel of Record
Michael J. Lentz
KRAMON & GRAHAM, P.A.
One South Street, Suite 2600
Baltimore, Maryland 21202
(410) 752-6030

Counsel for Petitioners

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400t ♦ Richmond, Virginia 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦www.thelexgroup.com

176pp

QUESTIONS PRESENTED

1. Must a plaintiff, suing under 18 U.S.C. 1964(c) for alleged violations of 18 U.S.C. 1962(a), plead and prove an injury from the investment or use of racketeering proceeds, as distinct from an injury arising out of a predicate act?

2. If the answer to question #1, above, is in the affirmative, can a plaintiff meet this requirement by pleading and proving that a corporate defendant invested racketeering proceeds in itself?

PARTIES TO THE ACTION
IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

1. Potomac Electric Power Company, Plaintiff-Appellant;

2. Electric Motor and Supply, Incorporated, Defendant-Appellee;

3. Ralph Force, Defendant-Appellee;

4. Charles M. Rhodes, Defendant-Appellee;

and

5. Darryl Price, Defendant

CORPORATE DISCLOSURE

Petitioner, Electric Motor and Supply, Incorporated, is not a publicly-held entity. No publicly-held entity owns ten percent (10%) or more of the stock of Electric Motor and Supply, Incorporated.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE ACTION ii

CORPORATE DISCLOSURE ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

PROCEDURAL HISTORY AND JURISDICTION 1

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 2

A. PERTINENT FACTS 2

1. Factual Background 2

2. PEPCO's Claims 3

3. Defendants' Response, and Appellate History of the Case 4

B. THE BASIS FOR JURISDICTION IN THE UNITED STATES DISTRICT COURT 7

REASONS FOR ALLOWANCE OF THE WRIT 7

I. THE FOURTH CIRCUIT'S REJECTION OF THE INVESTMENT INJURY RULE STANDS IN STARK CONTRAST TO THE LAW IN EVERY OTHER FEDERAL CIRCUIT THAT HAS ADDRESSED THE ISSUE 8

A. The Law in the Fourth Circuit: Busby v. Crown Supply, Inc. 9

B. The Law Everywhere Else: Ouaknine v. MacFarlane and its brethren 11

C. The Rejection of Busby's Analytical Underpinnings 12

II. THE FOURTH CIRCUIT'S ANALYSIS IN BUSBY IS DEMONSTRABLY FLAWED AND ITS PRECEDENTIAL SUPPORT HAS BEEN SUBSTANTIALLY ABROGATED; THIS COURT SHOULD CLARIFY THAT PLAINTIFFS SEEKING TO RECOVER UNDER 18 U.S.C. § 1964(c) FOR ALLEGED VIOLATIONS OF 18 U.S.C. § 1962(a) MUST PLEAD AND PROVE AN INJURY THAT FLOWS FROM THE INVESTMENT OR USE OF RACKETEERING INCOME 15

A. The statute is unambiguous; no interpretive canons need be relied on 15

B. Even if the language of RICO were ambiguous, proper statutory interpretation would require applying the investment injury rule 17

C. The scant precedential support for rejection of the investment injury rule that existed when the Fourth Circuit decided *Busby* has been almost entirely abrogated in the eleven years since 21

III. ADDITIONAL SUPPORT FOR ALLOWANCE OF THE WRIT: A SECOND SPLIT AMONG THE CIRCUITS 23

CONCLUSION 25

APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases:

American Nat'l Bank & Trust Co. of Chicago v. Haroco, Inc., 473 U.S. 606 (1985) 10, 11

American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257 (1916) 7

Beck v. Prupis, 529 U.S. 494 (2000) 17, 18, 26

Busby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990) ..... *passim*

Compagnie De Reassurance D'Ile de France v. New England Reinsurance Corp., 57 F.3d 56 (1st Cir. 1995) 11, 13

Craighead v. E.F. Hutton & Co., Inc., 899 F.2d 485 (6th Cir. 1990) 11-12, 22

Danielsen v. Burnside-Ott Aviation Training Center, Inc., 941 F.2d 1220 (D.C. Cir. 1991) 12, 13

Fogie v. THORN Americas, Inc., 190 F.3d 889 (8th Cir. 1999) 12, 24

Franchise Tax Bd. v.
Constr. Laborers Vacation Trust,
463 U.S. 1 (1983) 7

Glessner v. Kenney,
952 F.2d 702 (3d Cir. 1991) ..... *passim*

Grider v. Texas Oil & Gas Corp,
868 F.2d 1147 (10th Cir. 1989) ..... *passim*

King v. E.F. Hutton & Co.,
1987 U.S. Dist. LEXIS 13212 (1987) 21

Lightning Lube Inc. v. Witco Corp.,
4 F.3d 1153 (3d Cir. 1993) 11, 23

Nagel v. First of Michigan Corp.,
1990 U.S. Dist. LEXIS 16192 (1990) 22

In re Nat'l Mortgage Equity Corp. Certificates Litig.,
682 F. Supp. 1073 (C.D. Cal. 1987) 22

Newmyer v. Philatelic Leasing, Ltd.,
888 F.2d 385 (6th Cir. 1989) 23

Nugget Hydroelectric, L.P. v.
Pacific Gas & Elec. Co.,
981 F.2d 429 (9th Cir. 1992) 12, 13, 18, 22

Ouaknine v. MacFarlane,
897 F.2d 75 (2d Cir. 1990) ..... *passim*

Parker & Parsley Petroleum Co. v. Dresser Indus.,
972 F.2d 580 (5th Cir. 1992) 11

Reves v. Ernst & Young,
507 U.S. 170 (1993) 19, 20, 25

Rose v. Bartle,
871 F.2d 331 (3d Cir. 1989) 8, 21

Russello v. United States,
464 U.S. 16 (1983) 15, 16

St. Paul Mercury Ins. Co. v. Williamson,
224 F.3d 425 (5th Cir. 2000) 23, 24

Sedima, S.P.R.L. v. Imrex Co. Inc.,
473 U.S. 479 (1985) ..... *passim*

Smith v. MCI Telecommunications Corp.,
678 F. Supp. 823 (D. Kan 1987) 21-22

Snider v. Lone Star Art Trading Co.,
659 F. Supp. 1249 (E.D. Mich. 1987) 22

United States v. Turkette,
452 U.S. 576 (1981) 19, 20

United States v. Vogt,
910 F.2d 1184 (4th Cir. 1990) 23

Vemco, Inc. v. Camardella,
23 F.3d 129 (6th Cir. 1994) 23

Constitutional Provisions:

Article III, Section 2, U.S. Constitution 2

Statutes:

18 U.S.C. § 371 4

18 U.S.C. § 1341 4

18 U.S.C. § 1343 4

18 U.S.C. § 1961 ..... 2, 3

18 U.S.C. § 1961(3) 4

18 U.S.C. § 1961(4) 4

18 U.S.C. § 1962 ..... *passim*

18 U.S.C. 1962(a) ..... *passim*

18 U.S.C. § 1962(a)-(c) 14

18 U.S.C. § 1962(a)-(d) 15, 20

18 U.S.C. § 1962(b) 18

18 U.S.C. § 1962(c) ..... *passim*

18 U.S.C. § 1962(d) 5, 17, 18

18 U.S.C. § 1964 ..... 11, 17

18 U.S.C. § 1964(c) ..... *passim*

18 U.S.C. § 1964(d) 5

28 U.S.C. § 1254 2

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 7

OPINIONS BELOW

The Order of the United States Court of Appeals for the Fourth Circuit, sitting *en banc,* denying Petitioner's petition for rehearing *en banc* was not published, but is reproduced at Appendix page (hereinafter "App.") 33.

The Opinion of the United States Court of Appeals for the Fourth Circuit can be found at 262 F.3d 260 (2001), and is reproduced at App. 1.

The Opinion of the United States District Court for the District of Maryland at Baltimore can be found at 119 F. Supp. 2d 546 (2000), and is reproduced at App. 18.

PROCEDURAL HISTORY AND JURISDICTION

On August 10, 2001, a three-judge panel (the "Panel") of the United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit") entered an order affirming the ruling of the United States District Court for the District of Maryland at Baltimore (the "District Court").

The District Court ruled that Plaintiff-Appellee Potomac Electric Power Company ("PEPCO") was not required to plead or prove an injury caused by the use or investment of racketeering income, as distinct from an injury caused by a predicate act, in order to prevail on its claim under 18 U.S.C. § 1964(c) for alleged violations of 18 U.S.C. 1962(a).

The Panel affirmed the District Court, based on the Fourth Circuit's previous holding in Busby v. Crown Supply, Inc. Petitioner sought *en banc* rehearing of the Panel's ruling, which the Fourth Circuit denied by order dated October 22, 2001.

Petitioner seeks review in this Court of the August 10, 2001 order of the three-judge panel. Jurisdiction in this Court is proper pursuant to Article III, Section 2, of the Constitution of the United States, and pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional and statutory provisions are relevant to consideration of this petition:

Article III, Section 2, U.S. Constitution
28 U.S.C. § 1254
18 U.S.C. § 1964(c)
18 U.S.C. § 1961
18 U.S.C. § 1962.

Because their text is lengthy, the statutes have only been cited here. The full text of each relevant provision appears in the Appendix at pages 129-138.

STATEMENT OF THE CASE

A. PERTINENT FACTS

1. Factual Background

Potomac Electric Power Company ("PEPCO") is an electric utility company serving the Washington, D.C. metropolitan area. Electric Motor and Supply Incorporated ("EMS"), is a privately held corporation whose business is the repair of electric motors.

PEPCO solicited bids from various repair vendors for the repair of its motors. (Complaint, ¶ 13, App. 39). After reviewing bids, PEPCO selected a vendor, EMS, to service the motors on the basis of price and quality. Between 1985 and 1996, PEPCO sent many electric motors to EMS for repair. (Complaint, ¶ 17, App. 40).

2. PEPCO's Claims

On July 29, 1998, PEPCO filed a two-count Complaint against EMS, Ralph Force (EMS' Chief Executive Officer), Charles Rhodes (EMS' Engineering Manager), and Darryl Price (an EMS employee) in the United States District Court for the District of Maryland at Baltimore. The Complaint alleged violations of the Racketeer-Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* ("RICO").

The crux of PEPCO's Complaint is that: EMS failed to perform certain motor repair work, but still billed for it; the motor repair work performed was faulty and not performed to specifications; EMS falsified motor repair records to conceal work not performed or not performed according to the required PEPCO specifications; and EMS engaged in a pattern of lies and deceit to cover up its alleged illegal conduct. (Complaint, ¶¶ 17-21, App. 40-41). PEPCO also alleged that after EMS repaired PEPCO's electric motors, EMS allegedly mailed PEPCO invoices for the repairs, together with various types of documentation relating to the work performed by EMS. (Complaint, ¶ 15, App. 39). PEPCO claimed that upon receipt of the repaired electric motors, it forwarded payment to EMS via the United States mail. Id. Thus, PEPCO claimed that EMS committed ". . . mail fraud in

violation of 18 U.S.C. § 1341, wire fraud in violation of 18 U.S.C. § 1343, and conspiracy in violation of 18 U.S.C. § 371." (Complaint, ¶ 101, App. 83).

PEPCO's Complaint sought relief for violations of 18 U.S.C. § 1962(a) ("subsection a") and 18 U.S.C. § 1962(d) ("subsection d"). In support of its RICO claims, PEPCO alleged (1) that mail fraud, wire fraud, and conspiracy were the predicate acts (Complaint, ¶¶ 106, 115, App. 85, 86-87), (2) that "each defendant [was] a 'person' as defined in 18 U.S.C. § 1961(3), "and (3) that "EMS constitute[d] an enterprise under 18 U.S.C. § 1961(4) . . . ." (Complaint, ¶¶ 107, 108, 116,117, App. 85, 87).

PEPCO specifically alleged that "defendants' violation of 18 U.S.C. § 1962(a) caused PEPCO to suffer direct injury to its business and property through more than $1 million in payments for repair work either not performed at all or improperly performed, plus other damages and losses described above. " (Complaint, ¶ 112, App. 86). PEPCO also alleged that "all or a part of "the income received by EMS from PEPCO "was used to establish and operate the EMS enterprise in violation of 18 U.S.C. § 1962(a)." (Complaint, ¶ 111, App. 86).

3. Defendants' Response, and Appellate History of the Case

All defendants moved to dismiss the Complaint on the ground that it failed to state a claim upon which relief could be granted. Specifically, defendants argued that PEPCO's claim under Section 1962(a) was fatally deficient because it did not allege any injury which was caused by any use or investment of racketeering income. Defendants

recognized that the Fourth Circuit's decision in Busby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990), was to the contrary, but cited the majority rule which holds that an injury alleged under Section 1962(a) must flow from the use or investment of racketeering income, rather than merely from the predicate acts themselves (App. 97). Defendants also argued that the RICO conspiracy count, under section 1962(d), was defective because the defendants could not, as a matter of law, conspire with one another. PEPCO opposed the motion to dismiss (App. 108).

The District Court, recognizing that it was bound by the Busby decision, denied defendants' motion to dismiss the 1962(a) count, but granted defendants' motion to dismiss the 1962(d) count (App. 16-17). The case then went forward solely on the 1962(a) count.

At the conclusion of discovery, defendants filed motions for summary judgment. On November 8, 2000, the District Court granted defendants' motion for summary judgment on the grounds that PEPCO had not shown any damages. The District Court did not reach defendants' contention that summary judgment was also justified by lack of proof of fraud (App. 18). PEPCO appealed, and defendants noted a cross-appeal The cross-appeal raised the issue of the District Court's failure to grant defendants' motion for summary judgment for lack of proof of fraud, as well as the District Court's denial of defendants' motion to dismiss the 1962(a) count.

Recognizing that a panel of the Fourth Circuit was also bound by the Busby decision, defendants nevertheless raised the question of the correctness of the District Court's denial of their motion to dismiss. The Panel affirmed in part and reversed in part. The

Panel reversed the District Court's decision that summary judgment for defendants was proper, finding that PEPCO should be given the chance to prove nominal damages. The Panel did not reach the question of the cross-appeal on the issue of fraud, finding that the issue should first be presented to the District Court. Finally, the Panel noted that it could not decide the question of the viability of PEPCO's claim under Section 1962(a), since it was bound by the Busby decision, and the question must be presented to the *en banc* court for review (Panel Decision at fn. 2, App. 6).

Petitioners sought *en banc* review of the Panel's decision; the Fourth Circuit declined to grant *en banc* review. (App. 33-34)

Petitioners now ask this Court to determine whether a plaintiff, to prevail in an action under 18 U.S.C. § 1964(c) alleging a violation of 18 U.S.C. § 1962(a), must plead and prove injury caused by the use or investment of racketeering income, as distinct from an injury caused by a predicate act. Petitioners also ask this Court, if such a requirement is applicable, to determine whether the re-investment by a corporate defendant of racketeering proceeds in itself, satisfies the requirement. By reviewing and deciding these issues, this Court will resolve two separate long-standing splits among the circuits on this important matter.

B. THE BASIS FOR JURISDICTION IN THE UNITED STATES DISTRICT COURT

"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Since this case arises under the laws of the United States, original jurisdiction in the United States District Court was proper.

As Justice Holmes wrote for the Court, "[a] suit arises under the law that creates the cause of action." American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916). Thus, where federal law creates a cause of action, jurisdiction in the United States District Court is proper. *See, e.g.*, Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 8-9 (1983), *quoting* American Well Works *with approval.* In this case, PEPCO's cause of action is created by 18 U.S.C. § 1964(c), a federal law: "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court . . . . " Accordingly, original jurisdiction in the United States District Court was proper.

REASONS FOR ALLOWANCE OF THE WRIT

Petitioners recognize that this Court's review of the Order of the Fourth Circuit sitting *en banc* in this case is not a matter of right, but rather is vested in the sound discretion of this Court. For the reasons that follow, Petitioners respectfully suggest that exercise of this Court's discretion in this case warrants granting the writ.

I. THE FOURTH CIRCUIT'S REJECTION OF THE INVESTMENT INJURY RULE STANDS IN STARK CONTRAST TO THE LAW IN EVERY OTHER FEDERAL CIRCUIT THAT HAS ADDRESSED THE ISSUE

When a panel of the Fourth Circuit decided *Busby* in February, 1990, two other circuit courts of appeal and numerous district courts of the United States had held that injuries caused only by the alleged predicate acts were insufficient to support an action under subsection a. *See, e.g.,* Grider v. Texas Oil & Gas Corp, 868 F.2d 1147, 1149 (10th Cir. 1989); Rose v. Bartle, 871 F.2d 331, 357 (3d Cir. 1989). These courts uniformly held that some injury flowing from the use or investment of the racketeering proceeds was necessary to sustain an action under subsection a.[1] Id. Since the Fourth Circuit's decision to the contrary in Busby, seven other circuits have adopted the investment injury rule. In so doing, they have eroded much of the scant precedential support for Busby that existed when Busby was decided. The Fourth Circuit stands alone in permitting actions under subsection a without a showing that the alleged injury was caused by the investment or use of racketeering income.

---

[1] This requirement is commonly referred to as the "investment injury rule."

A. The Law in the Fourth Circuit: Busby v. Crown Supply, Inc.

John Busby was a sales representative for Crown Supply, Inc. ("Crown"). Crown paid its sales representatives on a commission basis, and provided monthly price books which set forth the cost of various goods to Crown and a suggested retail price. Busby alleged that certain officers and executives of Crown provided the sales force with false information on the costs of the sales items. Thus, Busby and his fellow sales representatives were allegedly cheated out of commissions which should have been paid.

Busby sued under subsection a and 18 U.S.C. § 1962(c) ("subsection c"). The district court granted defendants' motion to dismiss for several reasons. Pertinent to this petition, the district court held that the injuries alleged by Busby were not caused by any investment, but rather by the underlying predicate acts. Busby, 896 F.2d at 836 The district court adopted the investment injury rule and held that the injuries alleged by Busby were insufficient to state a claim under subsection a. Id.

The Busby Panel acknowledged that both the Third Circuit and the Tenth Circuit had already adopted the investment injury rule. The panel stated, however, that there was a "significant split in the courts," citing district court opinions which held that injury caused by the predicate racketeering acts was sufficient to sustain a claim under subsection a. Busby, 896 F.2d at 836-37.

The Busby Panel made three arguments to support its rejection of the investment injury rule. The first argument, sometimes referred to herein as Busby's "statutory argument" relied on the language of the

RICO statute and the nature of the injury. The second argument, referred to as the "liberal construction" argument, relied on the proposition that RICO should be liberally interpreted. The third argument, referred to as the "Sedima" argument, relied on an erroneous interpretation of this Court's opinions in Sedima, S.P.R.L. v. Imrex Co. Inc., 473 U.S. 479 (1985) and American Nat'l Bank & Trust Co. of Chicago v. Haroco, Inc., 473 U.S. 606 (1985).

First, the Busby Panel stated that the statutory language of Section 1962(a) did not support the district court's holding. Specifically, the Panel noted that Section 1964(c) states that any "person injured in his business or property by reason of a violation of Section 1962 may sue therefor . . . . " Busby, 896 F.2d at 837. The Busby Panel stated that "[n]othing in the 'by reason of' language of Section 1964(c), however, limits the compensable racketeering injuries to those sustained by the second prong, i.e., after the investment and/or use of the income. " Id. The Busby Panel referred to the "by reason of" clause as "broadly drafted, " and read that clause as sufficiently broad to permit recovery for injuries, even "despite the fact that one element of the violation, the use of the proceeds, may not have contributed to or caused the injury. " Busby, 896 F.2d at 838.

Second, the Busby Panel rejected the investment injury rule because it believed that the rule conflicted with the explicit policy that RICO be liberally interpreted. The Busby Panel feared that "corporate liability under RICO [would] be eviscerated" if the investment injury rule were adopted. Id.

Finally, the Busby Panel rejected the investment injury rule because it believed that the rule conflicted with this Court's treatment of 18 U.S.C. §§ 1962 and

1964 in Sedima and Haroco. Recognizing that both Sedima and Haroco were cases brought under subsection c, the Busby Panel nevertheless found that "[t]he Supreme Court was referring to Section 1962 as a whole in both cases, and in fact cited 1962(a) and the offense it defines in Sedima." Busby, 896 F.2d at 839. The Busby Panel therefore concluded that "Sedima instructs us to employ a traditional causation analysis in determining whether a RICO plaintiff has been injured 'by reason of' a Section 1962 violation." Id.

Busby stands alone, however. Not only have all other circuits that have considered the issue adopted the investment injury rule, but each of the three analytical girders that supports Busby has been soundly rejected by the various circuits that have addressed it.

B. The Law Everywhere Else: Ouaknine v. MacFarlane and its brethren

Only six days after Busby was decided, the Second Circuit reached entirely opposite conclusions on each of the grounds advanced by the Busby Panel. *See* Ouaknine v. MacFarlane, 897 F.2d 75 (2d Cir. 1990). All of the other circuit courts which have addressed this issue have likewise adopted the investment injury rule, and in so doing have expressly rejected one or more of the three arguments made by the *Busby* Panel. *See, e.g.*, Compagnie De Reassurance D'Ile de France v. New England Reinsurance Corp., 57 F.3d 56, 91 (1st Cir. 1995); Lightning Lube Inc. v. Witco Corp., 4 F.3d 1153, 1188 (3d Cir. 1993); Glessner v. Kenney, 952 F.2d 702, 709 (3d Cir. 1991); Parker & Parsley Petroleum Co. v. Dresser Indus., 972 F.2d 580, 584 (5th Cir. 1992); Craighead v. E.F. Hutton & Co., Inc., 899 F.2d 485, 494

(6th Cir. 1990); Fogie v. THORN Americas, Inc., 190 F.3d 889, 895 (8th Cir. 1999); Nugget Hydroelectric, L.P. v. Pacific Gas & Elec. Co., 981 F.2d 429, 437 (9th Cir. 1992); Grider, 868 F.2d at 1149 (10th Cir. 1989); Danielsen v. Burnside-Ott Aviation Training Center, Inc., 941 F.2d 1220, 1229-30 (D.C. Cir. 1991).

Of these, some have addressed and expressly rejected the Fourth Circuit's holding in Busby. *See, e.g.*, Nugget Hydroelectric, L.P., 981 F.2d at 437:

> [S]ection 1964(c) does not support [the Busby] reading, for it would allow an individual to recover for injuries caused by an action that does not constitute a violation of section 1962(a) even though section 1964(c) speaks not of an 'element of a violation' but rather only of a 'violation.' To allow recovery arising from a mere element of a violation, rather than an actual violation, of section 1962(c) [sic], we would have to have before us a statute worded differently from the one Congress passed.

C. The Rejection of Busby's Analytical Underpinnings

The Second Circuit and many of the other circuit courts have focused specifically on the language of the RICO statute and the nature of the alleged violation, and in so doing have rejected Busby's statutory argument. *See, e.g.*, Ouaknine, 897 F.2d at 82-83:

> [u]nder the plain language of [18 U.S.C. § 1962(a)], a violation . . . consists of *investing* income . . . the violation is not established by mere participation in predicate acts of racketeering. Accordingly, under the plain terms of the statute, to state a claim under § 1964(c) for a violation of § 1962(a), a plaintiff must allege injury by reason of defendants' investment of racketeering income in an enterprise.

Also see, e.g., New England Reinsurance Corp., 57 F.3d at 91-92 (plaintiffs did not state a claim under § 1962(a) by "simply repeating the crux of [their] allegations in regard to the pattern of racketeering activity"); Lightning Lube, 4 F.3d at 1188 ("§ 1962(a) is directed specifically at the use or investment of racketeering income, and requires that a plaintiff's injury be caused by the use or investment of income in the enterprise"); Nugget Hydroelectric, L.P., 981 F.2d at 437; Grider, 868 F.2d at 1149; Burnside-Ott, 941 F.2d at 1229-30 (finding the investment injury rule "so consistent with the language and import of the RICO statute that not requiring this allegation would be untenable").

The Second Circuit considered Busby's liberal construction argument, just as the Fourth Circuit had, and again reached the diametrically opposite conclusion. While recognizing that "[I]t is beyond doubt that RICO is to be construed broadly . . . ," Ouaknine nonetheless held that this tenet did not support rejection of the investment injury rule because "[T]hat general principle does not permit abrogation of the explicit words of the statute which here limit

recovery under Section 1962(a) to injury by reason of investment of racketeering income in an enterprise. " Ouaknine, 897 at 83.

Finally, the Second Circuit and others have considered, and expressly rejected, the Sedima argument advanced by the Busby Panel. *See, e.g.*, Ouaknine, 897 F.2d at 83:

> [Since] the essence of a violation of Section 1962(c) is the commission of racketeering acts in connection with conducting the affairs of an enterprise, the Supreme Court understandably contemplated recovery there for injury caused by the predicate acts of racketeering. As noted above, however, the essence of Section 1962(a), however, is not commission of predicate acts but investment of racketeering income. Furthermore, the Sedima Court specifically stated that a 'plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation.' (citations omitted).

Also see, e.g., Glessner, 952 F.2d at 709, which held that this Court's "[G]eneral discussion of standing under section 1964(c) [in Sedima] presupposed valid claims under sections 1962(a)-(c), " *quoting* Sedima ("'[I]f the defendant engages in a pattern of racketeering activity in a manner forbidden by [sections 1962(a)-(c)]' then injury resulting from predicate acts is sufficient to confer standing . . . . ").

II. THE FOURTH CIRCUIT'S ANALYSIS IN BUSBY IS DEMONSTRABLY FLAWED AND ITS PRECEDENTIAL SUPPORT HAS BEEN SUBSTANTIALLY ABROGATED; THIS COURT SHOULD CLARIFY THAT PLAINTIFFS SEEKING TO RECOVER UNDER 18 U.S.C. § 1964(c) FOR ALLEGED VIOLATIONS OF 18 U.S.C. § 1962(a) MUST PLEAD AND PROVE AN INJURY THAT FLOWS FROM THE INVESTMENT OR USE OF RACKETEERING INCOME

Busby v. Crown Supply Inc. was wrongly decided. The plain language of both statute sections, bedrock principles of statutory construction, and this Court's jurisprudence on the subject demonstrate that the Second Circuit and those circuits that follow her have analyzed the issue correctly, and that investment injury is necessary to sustain an action under 18 U.S.C. § 1964(c) if that action is based on an alleged violation of 18 U.S.C. § 1962(a).

A. The statute is unambiguous; no interpretive canons need be relied on

If the language of a statute is unambiguous, that language is conclusive of the meaning of the statute, absent a clear expression of contrary legislative intent. Russello v. United States, 464 U.S. 16, 20 (1983). RICO permits plaintiffs injured in their business or property "by reason of *a violation of*" sections1962(a)-(d) to sue for their injuries. 18 U.S.C. § 1964(c). Thus, plaintiffs may recover under 18 U.S.C. § 1964(c) only for actions which constitute violations of the enumerated sections.

18 U.S.C. § 1962(a), the section at issue in this petition, provides that it is " [U]nlawful . . .*to use or invest*, directly or indirectly, any part of such income [derived from a pattern of racketeering activity], or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. " 18 U.S.C. § 1962(a) (emphasis added).

The language of sections 1964(c) and 1962(a) is unambiguous; only use or investment violates section 1962(a), and only conduct which violates one of the subsections of 18 U.S.C. 1962 is actionable under section 1964(c). Because there has been no "clear expression of contrary legislative intent, " the plain language of the statute is conclusive of its meaning. Russello, 464 U.S. at 20.

The Tenth Circuit, the first circuit to consider the investment injury rule, recognized that only investment or use violates 18 U.S.C. § 1962(a): "[s]ignificantly, the statute does not state that it is unlawful to receive racketeering income; rather . . . the statute prohibits a person who *has received* such income *from using or investing it.* " Grider, 868 F.2d at 1149. This Court, although addressing a different issue, has long recognized the same thing: "section 1962 in turn makes it unlawful for 'any person' . . . to use money derived from a pattern of racketeering activity to invest in an enterprise, to acquire control of an enterprise through a pattern of racketeering activity, or to conduct an enterprise through a pattern of racketeering activity." Sedima, 473 U.S. at 495 (emphasis added).

No contrary conclusion is required by RICO's oft-cited liberal construction clause. Indeed, this Court's decision in Sedima makes this abundantly

clear. In Sedima, this Court held that the liberal construction clause and the requirement that criminal statutes must be strictly construed should be used "'only . . .as an aid for resolving an ambiguity; [and] not to beget one.'" Sedima, 473 U.S. at 491 n.10. Because the meaning of the statute is plain, the liberal construction mandate does not support rejection of the investment injury rule.

Thus, the plain language of RICO leads inescapably to the conclusion that because only investment or use of income violates 18 U.S.C. § 1962(a), injuries resulting from investment or use of income must be pled and proven if, as in this case, 18 U.S.C. § 1962(a) is the basis for a plaintiff's cause of action under 18 U.S.C. § 1964(c).

B. Even if the language of RICO were ambiguous, proper statutory interpretation would require applying the investment injury rule

That investment injury must be pled is demonstrated even more forcefully by an examination of RICO's statutory scheme without such a rule. A venerable canon of statutory construction admonishes that a statute should not be construed so as to render any of its provisions meaningless or superfluous. This Court has recently relied on this canon in construing 18 U.S.C. § 1962(d). *See* Beck v. Prupis, 529 U.S. 494, 506 (2000).

The Fourth Circuit's interpretation of RICO in Busby violates this rule. The Fourth Circuit held that "nothing in the 'by reason of' language of § 1964 limits compensable racketeering injuries to those sustained by the second prong, i.e. *after* the investment and/or

use of the income." (Citations omitted, emphasis in original). Busby, 896 F.2d at 837. The Fourth Circuit's inquiry is misdirected, however. The limiting language in section 1964(c) is not the phrase "by reason of," but rather the word "violation."

RICO permits civil actions for damages incurred by reason of violation of its various criminal provisions. These provisions criminalize use or investment of racketeering income (section 1962(a)), acquisition or maintenance of an interest in an enterprise (section 1962(b)), conducting or participating in the affairs of an enterprise (section 1962(c)), and conspiring to do any of the foregoing (section 1962(d)).

A defendant who has not used or invested racketeering income has not violated section 1962(a). Thus, no cause of action lies under section 1964(c), because no *violation* of section 1962(a) has occurred. Indeed, this Court has recognized that injury is not actionable under section 1964(c) unless it is "[I]ndependently wrongful under [a] substantive provision of the statute." Beck, 529 U.S. at 506. *See also* Nugget Hydroelectric, L.P., 981 F.2d at 437 ("[S]ection 1964(c) does not support [the Busby] reading, for it would allow an individual to recover for injuries caused by an action that does not constitute a violation of section 1962(a), even though section 1964(c) speaks not of an 'element of a violation' but rather only of a 'violation.').[2]

---

[2] In Beck, this Court appeared to recognize the split among the Circuits on the investment injury rule: ". . . although we express no view on this issue, arguably a plaintiff suing for a violation of § 1962(d) based on an agreement to violate § 1962(a) is required to allege injury from the 'use or investment' of illicit proceeds. Beck, 529 U.S. at 506 n.9.

If investment injury is not required to establish a violation of section 1962(a), that section is entirely subsumed by section 1962(c); all conduct that violates section 1962(a) will also violate section 1962(c). Subsection a, then, would be entirely superfluous. Such an interpretation, in addition to violating basic principles of statutory construction, is directly contrary to Congress' intent when it enacted RICO: "[i]n their comments on the floor, Members of Congress consistently referred to subsection (c) as prohibiting the *operation* of an enterprise through a pattern of racketeering activity and to subsections (a) and (b) as prohibiting the *acquisition* of an enterprise." Reves v. Ernst & Young, 507 U.S. 170, 182 (1993). *See also* United States v. Turkette, 452 U.S. 576, 584 (1981) (noting distinction between section 1962(c), which criminalizes participation, and section 1962(a), which criminalizes investment). Because the statute should be construed so as to give meaning to all of its provisions, rejection of the investment injury rule is untenable; the investment injury rule must be the law.

Adopting the investment injury rule and overturning Busby also interprets RICO consistently with Congress' intent, as expressed in RICO's legislative history. Application of the investment injury rule was, in essence, pre-saged by Congress. Indeed, this Court recognized in *Reves* that such limitations were likely critical to the passage of the act:

> [C]ritics of the bill raised concerns that racketeering activity was defined so broadly that RICO would reach many crimes not necessarily typical of organized crime. Senator McClellan reassured the bill's critics that the critical limitation was not to be found in § 1961(1)'s list of predicate crimes but in the statute's other requirements, including those of § 1962: "Unless an individual not only commits such a crime but engages in a pattern of such violations, and uses that pattern to obtain or operate an interest in an interstate business, he is not made subject to proceedings under [RICO]." Reves, 507 U.S. at 183, *quoting* 116 Cong. Rec., at 18940.

Thus, Congress specifically intended that the language of RICO's substantive provisions, sections 1962(a)-(d), should limit, rather than expand, its scope. Likewise, this Court has held it "obvious" that section 1962(a) is directed at "[T]he infiltration by organized crime of legitimate businesses . . ." Turkette, 452 U.S. at 584.

This Court has recognized that RICO is a criminal statute, directed at the "pervasive[]" problem of organized crime, and, *inter alia*, the "infiltrat[ion] and corrupt[ion] [of] legitimate business" using racketeering proceeds. *See, e.g.*, Turkette, 452 U.S. at 588, *quoting* RICO's Statement of Findings, 84 Stat. 922-923. RICO does not turn its myriad predicate acts, without more, into crimes of racketeering. Likewise, it does not, and should not, federalize garden-variety claims of fraud and breach of contract such as those at

issue in the District Court here. If the Busby decision is allowed to stand, however, one of the limitations of which Senator McClellan spoke, and upon which his colleagues in congress relied, will be eviscerated.

C. The scant precedential support for rejection of the investment injury rule that existed when the Fourth Circuit decided *Busby* has been almost entirely abrogated in the eleven years since

When the Fourth Circuit decided Busby, only two other Circuit Courts of Appeals, the third and the tenth, had addressed the issue. *See* Rose v. Bartle, 871 F.2d 331, 357-58 (3d Cir. 1989); Grider, 868 F.2d at 1149-50 (10th Cir. 1989), *cert. denied*, 493 U.S. 820 (1989). Both had adopted the investment injury rule. Id.

However, the Fourth Circuit correctly noted that several district courts had rejected the investment injury rule. *See* Busby, 896 F.2d at 837, and cases therein cited. Many of these district courts relied, as did the Fourth Circuit in Busby, on a misinterpretation of this Court's ruling in Sedima, which ruling they believed compelled rejection of the investment injury rule. *See, e.g.*, King v. E.F. Hutton & Co., 1987 U.S. Dist. LEXIS 13212, *30 (court held that it was "not at liberty to adopt a requirement that the Supreme Court implicitly rejected.").

Likewise, the rejection of the investment injury rule by many of the district courts cited by the Fourth Circuit has been subsequently abrogated by decisions of the Court of Appeals for the applicable circuit which expressly adopt the investment injury rule. *See, e.g.*, Grider, 868 F.2d at 1149 (adopting the investment injury rule and essentially overruling Smith v. MCI

Telecommunications Corp., 678 F. Supp. 823, 828 (D. Kan 1987), cited in Busby); Craighead v. E.F. Hutton Co., Inc., 899 F.2d 485, 494 (6th Cir.1990) (adopting the rule in contravention of Snider v. Lone Star Art Trading Co., 659 F. Supp. 1249, 1255-56 (E.D. Mich. 1987), cited in Busby); Nagel v. First of Michigan Corp., 1990 U.S. Dist. LEXIS 16192, *31 ("Given the Sixth Circuit's later opinion in Craighead, it is clear that the Sixth Circuit, although agreeing with the outcome [of Snider], does not support the District Court's language . . . . ").[3] *See also* Nugget Hydroelectric, L.P., 981 F.2d at 437 (adopting the rule for the Ninth Circuit, in contravention of In re Nat'l Mortgage Equity Corp. Certificates Litig., 682 F. Supp. 1073, 1081 (C.D. Cal. 1987), cited in Busby).[4]

Thus, Busby rests on thin precedential ice. Virtually all of the decisions cited by the Fourth Circuit in support of rejecting the investment injury rule have either been abrogated or depend on a flawed reading of this Court's decision in Sedima.

---

[3] The plaintiff in Snider had alleged investment injury. Thus, the District Court's rejection of the investment injury rule was dictum. The Sixth Circuit thus agreed with the outcome of *Snider*, because investment injury had been pled, but rejected the dictum that no such injury was necessary.

[4] It is unclear to what extent National Mortgage supported the Busby holding even before the Ninth Circuit adopted the investment injury rule. Defendants claimed that plaintiffs, although they had alleged use of investment proceeds, had not done so with sufficient particularity. The Court called the argument "meritless," and held that plaintiff's claims alleging investment use were "sufficiently pleaded." National Mortgage, 682 F.Supp. at 1080, 1081 n.14.

III. ADDITIONAL SUPPORT FOR ALLOWANCE OF THE WRIT: A SECOND SPLIT AMONG THE CIRCUITS

The split between the Fourth Circuit and every other circuit to address the issue of whether to apply the investment injury rule is not the only split among the circuits that will be resolved if the Court grants the writ in this case.

Respondent has alleged below that EMS invested racketeering proceeds in itself. (App. 93. Among the circuits that have adopted the investment injury rule, there is a split regarding whether such re-investment by an enterprise of racketeering proceeds into itself satisfies the investment injury rule.

A minority of circuits hold that re-investment satisfies the investment injury rule. *See, e.g.*, St. Paul Mercury Ins. Co. v. Williamson, 224 F.3d 425, 442 (5th Cir. 2000); *Cf.* United States v. Vogt, 910 F.2d 1184, 1994 (4th Cir. 1990) (holding that in a criminal matter, "rigorous proof of the exact course of income . . . into its ultimate 'use or investment'" was not required).

In the Sixth Circuit, the question is unsettled. *See* Newmyer v. Philatelic Leasing, Ltd., 888 F.2d 385, 396 (6th Cir. 1989) (holding reinvestment sufficient); *But see* Vemco, Inc. v. Camardella, 23 F.3d 129 (6th Cir. 1994) (holding re-investment insufficient, and distinguishing Newmyer because in that case the enterprise was *created* from racketeering proceeds).

Most circuits that have addressed the issue hold that re-investment of proceeds by the enterprise in itself, as alleged by Respondents below, does not satisfy the rule. *See, e.g.*, Ouaknine, 897 F.2d at 82-83 (*citing, inter alia,* Grider *and* Newmyer); Lightning Lube, 4 F.3d at 1187-88; Glessner, 952 F.2d at 709 (and

cases cited therein). The interpretation of Quaknine and the circuits that follow it is the correct one; the rule of St. Paul Mercury would render the investment injury rule virtually nugatory.

The Third Circuit has explained that if re-investment of racketeering proceeds in oneself were to satisfy the investment injury rule, "the distinction between sections 1962(a) and 1962(c) would be blurred." Glessner, 952 F.2d at 709. This is an understatement; the distinction between those sections would be lost entirely, at least for corporate defendants:

> . . . if reinvestment were to suffice, the [investment injury rule] would be almost completely eviscerated when [defendant is] a corporation . . . .over the long term, corporations generally reinvest their profits, regardless of source. " Fogie, 190 F.3d at 896.

The logic of this position is plain and compelling. Because RICO will be broadly construed, a corporation might be deemed to be using or investing money whenever it pays employees, purchases office supplies, or performs any number of mundane tasks essential to the continued functioning of the corporation. If such use or investment is sufficient to establish investment injury, mere receipt of rackeetering proceeds by a corporation will establish a violation of section 1962(a).

As demonstrated above, this result was not intended by Congress when it enacted RICO. Section 1962(a) was directed at the "acquisition of an enterprise, " while section 1962(c) was directed at

"operation of an enterprise through a pattern of racketeering activity." Reves, 507 U.S. at 182. Neither section was intended to criminalize, or impose civil liability for, the ordinary daily operation of the business of a corporation.

Construing RICO to allow re-investment to satisfy the investment injury rule will virtually eliminate the distinction between sections 1962(a) and 1962(c). Such a construction also runs contrary to the demonstrated intent of Congress in enacting RICO, which this Court has recognized and respected in its previous jurisprudence on the subject.

CONCLUSION

The Fourth Circuit's rejection of the investment injury rule in the Busby decision stands alone among the circuits. In addition, although only a few circuits have addressed all of Busby's supporting arguments, each such argument has been addressed in other circuits and rejected by those that have addressed it. Thus, Busby and each of the analytical legs upon which it critically depends for support present a stark conflict among the various federal circuits on an important matter.

Petitioners respectfully submit that such a conflict, without more, would warrant allowance of the writ in this case. But, even circuits which uniformly apply the investment injury rule differ as to how that rule should be applied. The Court can resolve both splits by granting the writ in this case.

Busby stands alone, and for good reason. The Busby decision runs directly contrary to the meaning of an unambiguous statute, violates venerable canons of statutory interpretation, misinterprets the intent of

Congress, and rests on bad precedent. Most importantly, however, Busby misinterprets this Court's jurisprudence; Sedima does not support, much less require, rejection of the investment injury rule. Indeed, this Court announced in 2000 that it ". . . express[ed] no position on this issue." Beck, 529 U.S. at 506 n.9.

For the foregoing reasons, petitioners respectfully request that this Court exercise its discretionary authority and grant their petition for a writ of certiorari to the United States Court of Appeals to the Fourth Circuit.

Respectfully submitted,

Dated: December 31, 2001

James P. Ulwick
Counsel of Record
Michael J. Lentz
Kramon & Graham, P.A.
One South Street, Suite 2600
Baltimore, Maryland 21202
(410) 752-6030

TABLE OF CONTENTS
Appendix to Petition

Page

Opinion
United States Court of Appeals
for the Fourth Circuit
entered August 10, 2001 ..... App. 1

Memorandum Opinion and Order of
The Honorable Frederic N. Smalkin
Re: Granting Defendant's Motion to
Dismiss Count I of the Complaint,
Denying Defendant's Motion to
Dismiss Count II of the Complaint
entered February 19, 1999 ..... App. 16

Memorandum Opinion of
The Honorable Frederick N. Smalkin
filed November 8, 2000 ..... App. 18

Order and Judgment
filed November 8, 2000 ..... App. 32

Order
United States Court of Appeals
for the Fourth Circuit
Re: Denying Petition for Rehearing and
Petition for Rehearing *En Banc*
entered October 22, 2001 ..... App. 33

Complaint
filed July 29, 1998 ..... App. 35

Defendants' Motion to Dismiss
Counts I and II of Plaintiff's Complaint,
with Memorandum in Support,
entered January 20, 1999 ..... App. 88

Plaintiff's Response to Defendants'
Motion to Dismiss Counts I and II
of the Complaint
entered February 2, 1999 ..... App. 108

Article III, Section 2, U.S. Constitution ..... App. 129

28 U.S.C. § 1254 ..... App. 130

18 U.S.C. § 1964(c) ..... App. 131

18 U.S.C. § 1961 ..... App. 132

18 U.S.C. § 1962 ..... App. 137

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

POTOMAC ELECTRIC POWER COMPANY,
Plaintiff-Appellant,

v. No. 00-2542

ELECTRIC MOTOR AND SUPPLY,
INCORPORATED; RALPH FORCE;
CHARLES M. RHODES,
Defendants-Appellees,

and

DARRYL PRICE,
Defendant.

POTOMAC ELECTRIC POWER COMPANY,
Plaintiff-Appellee,

v. No. 00-2557

ELECTRIC MOTOR AND SUPPLY,
INCORPORATED; RALPH FORCE;
CHARLES M. RHODES,
Defendants-Appellants,

and

DARRYL PRICE,
Defendant.

Appeals from the United States District Court
for the District of Maryland at Baltimore.
Frederic N. Smalkin, District Judge.
(CA-98-2519-S)

Argued: June 6, 2001
Decided: August 10, 2001
[Entered: August 10, 2001]

Before WILLIAMS, KING, and GREGORY,
Circuit Judges.

Affirmed in part, reversed in part, and remanded by published opinion. Judge Williams wrote the opinion, in which Judge King and Judge Gregory joined.

COUNSEL

ARGUED: James Patrick Gillece, Jr., MCGUIRE WOODS, L.L.P., Baltimore, Maryland, for Appellant. James Patrick Ulwick, KRAMON & GRAHAM, Baltimore, Maryland, for Appellees.

ON BRIEF: Robert R. Niccolini, MCGUIRE WOODS, L.L.P., Baltimore, Maryland, for Appellant. Bruce L. Marcus, MARCUS & BONSIB, Greenbelt, Maryland, for Appellee Force; Paul F. Kemp, CATTERTON, KEMP & GREENBERG, Rockville, Maryland, for Appellee Electric Motor.

OPINION

WILLIAMS, Circuit Judge:

Potomac Electric Power Co. (PEPCO) appeals the district court's grant of summary judgment to Electric Motor and Supply, Inc., Ralph Force, and Charles Rhodes (collectively EMS) on its claims arising under the private suit provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.A. § 1962, and EMS crossappeals from the district court's failure to grant summary judgment in EMS's favor on the alternate ground of lack of proof of fraud and its failure to dismiss the case on the ground of lack of "investment injury." For the reasons that follow, we affirm in part, reverse in part, and remand for additional proceedings.

I.

A.

PEPCO is an electric utility company serving the Washington, D.C. metropolitan area. EMS is a privately held corporation whose business is the repair of electric motors; its plant and office is in Altoona, Pennsylvania. Ralph Force is the owner of EMS, and Charles Rhodes is its Chief Engineer. From 1985 until 1996, EMS provided electric motor repair services for PEPCO as a result of EMS's successful bids for PEPCO's work. PEPCO generally sent its motors to EMS for repair only after they failed. With rare exceptions, EMS returned the motors to PEPCO in a repaired and working

condition that passed PEPCO's internal inspection process. No evidence in the record indicates that any of the motors repaired by EMS had failed as of September, 1999.

In March of 1994, PEPCO received an anonymous tip suggesting that certain PEPCO employees had engaged in fraudulent bid-rigging in conjunction with EMS employees. As a result, PEPCO commenced an internal investigation that initially focused on bid-rigging but eventually broadened to include the issue of whether EMS had knowingly failed to repair PEPCO's motors pursuant to PEPCO's specifications. In August of 1994, PEPCO's internal investigation concluded that EMS had knowingly failed to perform PEPCO's repairs as specified.

PEPCO principally alleges that its specifications required its motors to be repaired using epoxy through a process called vacuum pressure impregnation (VPI), and that two separate VPI treatments were required. Evidence indicates that by at least 1992, PEPCO had reminded EMS that its bid specifications required this "double VPI" treatment. Richard Beegle, who was plant manager for EMS's facility in Altoona from May of 1991 until October of 1993, stated in an affidavit that after EMS received these specifications, it nonetheless performed only one VPI treatment, and used polyester instead of epoxy in repairing the motors. Beegle further testified that EMS occasionally applied an epoxy coating over the polyester to cover up noncompliance with PEPCO's specifications, sometimes prepared false documentation for PEPCO showing that work had been performed using epoxy and two VPI treatments, and falsified the results of tests designed to evaluate

the attributes of the repaired motor.[1] Tests performed for PEPCO by an outside company showed that at least two motors repaired by EMS were repaired using polyester instead of epoxy and then covered with epoxy in a manner that tended to conceal this fact.

B.

On July 29, 1998, PEPCO filed suit under RICO, 18 U.S.C.A. § 1962 (West 2000), alleging that EMS engaged in fraudulent activities in the repair of PEPCO electric motors over a period of several years. On January 20, 1999, EMS filed a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), which the district court granted in part and denied in part. The portion of the district court's ruling on the motion to dismiss that is under review here is the district court's denial of EMS's motion to dismiss Count I of PEPCO's complaint on the basis that PEPCO failed to allege that its injury derived from EMS's use of racketeering proceeds. Following discovery, EMS filed two separate motions for summary judgment, one for lack of proof of fraud and the other for lack of proof of damages. The district court granted the motion for summary judgment on the basis of lack of proof of damages and did not reach EMS's contention that summary judgment was also justified by lack of proof of fraud. PEPCO timely

---

[1] EMS claims that Beegle has "no admissible testimony." (Appellee's Br. at 12.) This putative evidentiary challenge, however, is in fact simply a reflection of EMS's statute of limitations argument, *see infra* Part III, and because we find the record inadequately developed to resolve the statute of limitations issue, we proceed on the assumption that Beegle's testimony is relevant and admissible.

appealed from the grant of summary judgment, and EMS cross-appealed from the district court's failure to grant its motion for summary judgment for lack of proof of fraud, as well as from the partial denial of its motion to dismiss.

II.

A private RICO plaintiff only has standing to bring suit if he can show damage to "business or property" proximately caused by the defendant's RICO violation.[2] *See* 18 U.S.C. § 1964(c) (providing that a plaintiff must show that it was "injured in [its] business or property by reason of a violation"); *Caviness v. Derand Resources Corp.*, 983 F.2d 1295, 1305 (4th Cir. 1993) (stating that a plaintiff must show "damage proximately caused by the violation"). PEPCO argues that it adduced sufficient proof of the fact of injury to survive EMS's motion for summary judgment.

---

2 In this Circuit, a plaintiff need not show that the damages flowed from the use or investment of the racketeering income, only that damages flowed from racketeering activity itself. *Busby v. Crown Supply, Inc.*, 896 F.2d 833, 837 (4th Cir. 1990). Every other circuit to address the issue has adopted an "investment use injury" requirement, holding that a plaintiff's damages must be caused by the defendant's use of the proceeds of racketeering. *See, e.g., Danielsen v. Burnside-Ott Aviation Training Ctr., Inc.*, 941 F.2d 1220, 1230 (D.C. Cir. 1991) (rejecting the *Busby* rule). Recognizing that the panel is bound by *Busby*, EMS nonetheless seeks to preserve the "investment use" issue for *en banc* review. As this panel must follow *Busby*, EMS's request to overrule that decision must be raised to the *en banc* court and need not detain us longer. *See Laughlin v. Metro. Washington Airports Auth.*, 149 F.3d 253, 260 (4th Cir. 1998) (stating that a panel cannot overrule a decision of a prior panel).

The district court, however, found that PEPCO presented no evidence that the motors repaired by EMS failed more frequently, had a shorter useful life, or were less valuable as a result of EMS's claimed failure to follow repair specifications. PEPCO claimed that the proper measure of damages was the entire repair price, and thus, it was simply entitled to the return of all funds paid to EMS for noncompliant repairs; the district court found this argument unpersuasive. As a result, the district court held that the amount of damages was "speculative and unprovable," precluding RICO liability. (J.A. at 645.)

The district court correctly found that PEPCO adduced no evidence that any motor repaired by EMS had failed or had not performed as well due to EMS's claimed fraud. Further, PEPCO's argument that the proper measure of its damages is the entire price paid for repairs founders because PEPCO must produce evidence of the actual value of the services that were rendered. *See, e.g., Western Contracting Corp. v. Bechtel Corp.*, 885 F.2d 1196, 1203-04 (4th Cir. 1989) (stating that even using Maryland's "out-of-pocket" method for determining damages, plaintiff must produce evidence of the actual value of the services rendered). Granting PEPCO a refund of the entire amount paid for repairs would obviously confer on PEPCO a large windfall, because even if the motors were not repaired in conformity with each specification, it is undisputed that most of the work that PEPCO paid for was performed by EMS and that the motors were returned in repaired, working order.

PEPCO nevertheless argues that it need not show that the motors' performance was diminished or that the motors were less valuable as a result of EMS's failure to perform repairs as specified. We agree. If a party specifically bargains for a service, is told that the service has been performed, is charged for the service, and does not in fact receive the service, it is not appropriate for courts to inquire into whether the service "really" had value as a precondition to finding that injury to business or property has occurred. *See Hellenic Lines, Ltd. v. O'Hearn*, 523 F. Supp. 244, 248 (S.D.N.Y. 1981) (stating that RICO injury is proved where a company demonstrated that "padded" bills resulted in payment for services not rendered). If the evidence indicates that a party paid value for a good or service, this fact is a more reliable indicator that the service actually had value to the party than the post hoc intuition of a court as to the good or service's value. John Morykon, EMS's own witness, testified that PEPCO probably was charged more for the repairs because the specifications were higher than industry standards. Even if PEPCO's asserted idiosyncratic specifications – requiring "double VPI treatments," etc. – did absolutely nothing to improve the reliability of its motors, these specifications represented a service for which PEPCO bargained, paid, and allegedly did not receive despite EMS's representations to the contrary. PEPCO's analogy is apt: If a consumer bargains for and pays extra for an automotive transmission repair to be performed using original manufacturer parts, an auto repair shop commits fraud if it performs the repair using generic parts and tells the consumer that original manufacturer parts were used, regardless of whether the generic parts are actually less useful or reliable.

Our conclusion is buttressed by the language of § 1964(c), which confers RICO standing on "any person injured in his business or property," not any person who can quantify the amount of the injury. The best reading of § 1964(c)'s injury to business or property requirement is that it refers to the fact of injury and not the amount. If PEPCO can establish that EMS represented that it was complying with specifications and intentionally did not do so while charging a contract price that reflected the specifications, PEPCO has been "injured in its property" to the extent of the difference between the amount it paid and the amount it would have paid under specifications reflecting the actual work performed. Even if the precise amount of its injury is not susceptible of ready proof, it is clear that a reasonable finder of fact could infer that some injury has occurred; that is, the finder of fact could infer from the fact that the parties bargained for expensive additional procedures that the cost of those procedures influenced the contract price.

The district court followed Ninth Circuit precedent holding that *quantifiable* RICO damages are an essential prerequisite to core RICO liability. *See Oscar v. Univ. Students Coop. Ass'n*, 965 F.2d 783, 785 (9th Cir. 1992). However, the district court's statement of its holding is inconsistent with the Ninth Circuit's approach. *See* J.A. at 642 ("the plaintiff . . . must show that he has suffered *some* compensable damage." (emphasis added)). Similarly, this Circuit has not held that quantifiable damages are a necessary precondition to RICO liability; instead, this Circuit has formulated the requirement in terms of the necessity of proving

some damages, not a specific amount. *Caviness*, 983 F.2d at 1305 (requiring a showing of "damage proximately caused by the violation"). PEPCO argues that at a minimum, it has demonstrated some damage and argues that in the absence of proof of a specific amount, it is entitled to nominal damages, which would trigger an award of attorney's fees. Indeed, under analogous provisions of the Clayton Act, the Second Circuit has upheld just such an award of nominal damages and attorney's fees. *United States Football League v. National Football League*, 887 F.2d 408, 411 (2d Cir. 1989). *Cf. McDonnell v. Miller Oil Co.*, 134 F.3d 638, 640-41 (4th Cir. 1998) (suggesting that nominal damages may be appropriate under the Family and Medical Leave Act, but noting that a reduction in the award of attorney's fees may be warranted when only nominal damages are proven); *Rosario v. Livaditis*, 963 F.2d 1013, 1021 (7th Cir. 1992) (remanding for a new trial on damages because in a RICO case, the jury found liability but "did not award even nominal damages on the RICO counts"). EMS, in its reply brief, provides no case law or argument as to why nominal damages is not a viable concept under civil RICO. Thus, we conclude that the district court erred in granting summary judgment on the basis of inability to prove the amount of damages; if the motors were not repaired according to specifications *some* amount of damage likely is present, even if PEPCO cannot prove the amount, and a nominal amount of damage is adequate to support liability.

III.

EMS argues as an alternative ground for affirmance that PEPCO failed to create a triable issue of fact as to whether EMS fraudulently repaired PEPCO's motors on more than one occasion; the district court did not reach this issue, granting summary judgment instead on the ground of lack of proof of injury. Private RICO suits are governed by a four-year statute of limitations, which runs from the date when the plaintiff discovered, or should have discovered, the injury. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 183 (1997); *Rotella v. Wood*, 528 U.S. 549, 555 (2000) (discovery of injury, not of other elements of the claim, starts the statute of limitations clock). As EMS notes, PEPCO may not "bootstrap" time-barred claims by linking them to later, non-time-barred claims. *Klehr*, 521 U.S. at 190. Here, EMS asserts that PEPCO was on notice of the potential violations by at least March of 1994, while PEPCO claims it did not have, and should not have had, knowledge until August of 1994. Since PEPCO filed its complaint on July 29, 1998, the application of the statute of limitations essentially turns on the question of whether, with respect to each alleged injury, PEPCO knew or should have known of its injury prior to July 29, 1994. Because the evidence is in conflict relative to when PEPCO discovered or should have discovered EMS's alleged fraudulent repair practices, because resolving these conflicts will involve a fact-intensive determination, and because the district court has not grappled with the detailed factual evidence regarding when PEPCO knew or should have known about each

separate alleged incident, we believe it would be unwise to resolve this issue for the first time on appeal; instead, the district court should resolve it on remand. Assuming that predicate acts occurring before July 1994 are not time-barred, the testimony of EMS employee Richard Beegle clearly creates a disputed issue of material fact as to fraud; Beegle states that from May 1991 to October 1993, when he was an EMS employee, he witnessed a host of knowing failures to repair motors in accordance with specifications and observed EMS staff filling out fraudulent paperwork stating to PEPCO that work had been performed when it had not been. Further, EMS's time entry reports often state that only one VPI treatment was performed on a given motor when other documentation reflects that two treatments were performed. EMS argues that these time entry reports were prepared for internal purposes and are not accurate; but this is an issue for the trier of fact. If PEPCO's statute of limitations argument is correct on the facts in this case, which have not been fully developed relative to this issue, there is adequate proof of more than one instance of fraud to survive summary judgment.

IV.

PEPCO further argues that it may obtain recission and other equitable remedies under civil RICO. As a threshold matter, while PEPCO argues on appeal that it is entitled to equitable recission, restitution, and constructive trust, before the district court, PEPCO argued only for recission and not for restitution or constructive trust. We decline to consider PEPCO's restitution and constructive trust arguments, as these arguments were not raised below. *Bregman, Berbert & Schwartz, L.L.C. v. United States*, 145 F.3d 664, 670 n.8 (4th Cir. 1998).

Recission ordinarily involves a judicial termination of a party's contract obligations; it is a court-ordered "unwinding" of a contract, with the goal of returning the parties to the status quo prior to contracting. *Lazorcak v. Feuerstein*, 273 Md. 69, 75 (1974). Given that the contract at issue is a contract for services, recission in the declaratory or injunctive sense is simply not feasible; a court cannot order PEPCO's motors "un-repaired," which would be necessary in order fully to undo the contract.[4] *See Leaf Co. v. Montgomery County*, 70 Md. App. 170, 180 (1987) ("The

---

[4] Given the infeasibility of declaratory or injunctive relief in this case, we have no occasion to consider the parties' arguments as to whether equitable relief is available in a private civil RICO action, and reserve for another day the question of whether relief which goes beyond a purely compensatory measure of money damages is available in private civil RICO actions. *Compare Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1084 (9th Cir. 1986) (concluding that injunctive relief is not available in private civil RICO actions), *with Chambers Dev. Co. v. Browning-Ferris Indus.*, 590 F. Supp. 1528, 1540-41 (W.D. Pa. 1984) (holding that injunctive relief is available in private civil RICO actions)

contract is one for services already performed, which is not susceptible of recission."). PEPCO also requests a recission "measure of damages" in which PEPCO simply receives money damages equal to the amount which it paid minus the fair value of services performed. This approach is, in essence, a request for a compensatory money damages award, and it is subject to the same infirmity that plagues PEPCO's entire case, namely PEPCO's inability to quantify the value of the services that EMS allegedly did not perform. *See Volckmann v. Edwards*, 642 F. Supp. 109, 115 (N.D. Cal. 1986) (recission available in private RICO where "it amount[s] to out-of-pocket losses – damages, in essence"); *Western Contracting Corp. v. Bechtel Corp.*, 885 F.2d 1196, 1204 (4th Cir. 1989) (stating that under Maryland's essentially recissionary "out of pocket" method for determining damages, the plaintiff must produce evidence of the actual value of the services rendered).[5]

---

5 5PEPCO suggested at oral argument that when the recissionary measure of money damages is used, the burden shifts to EMS to prove the fair market value of the services rendered. PEPCO provides no authority for this assertion, and we believe that *Western Contracting Corp. v. Bechtel Corp*, 885 F.2d 1196, 1204 (4th Cir. 1989), provides a contrary rule for fraud cases.

V.

Because PEPCO adduced sufficient proof of the fact of injury to its business or property to survive summary judgment, we reverse the district court's grant of summary judgment to EMS on the basis of lack of proof of damages. We remand to the district court to consider EMS's motion for summary judgment based on lack of proof of fraud. Because we are bound by circuit precedent, we are constrained not to take up EMS's request that we hold that "investment use injury" is an essential prerequisite of a civil RICO action. Finally, we hold that PEPCO is not entitled to recission.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Entered: February 19, 1999]

POTOMAC ELECTRIC POWER COMPANY :

v. :

ELECTRIC MOTOR SUPPLY, INC., et al. :

CIVIL NO. S 98-2519

MEMORANDUM AND ORDER

Having considered the defendants' motion to dismiss, and the plaintiff's response thereto, no further briefing having been submitted, the Court is of. the opinion that the motion must be granted in part and denied in part.

Under the decision of the Fourth Circuit in *Busby v. Crown Supply*, 896 F.2d 833 (4th Cir. 1990), the complaint states an adequate *prima facie* claim for relief in Count I under RICO, notwithstanding the absence of any allegation of "investment use" of illegally derived funds. Although *Busby* has not been followed by any other circuit among the other seven to have considered the issue, the rule of *stars decisis* nonetheless binds this Court to follow *Busby*. The Court has considered, but rejects as unlikely to do any good, the possibility of certifying the issue of the continued viability of Busby for interlocutory consideration by the Fourth Circuit, but, in light of the lack of any issue of great political or social moment raised by this case, it deems the prospect of the allowance of such an appeal - - and/or *en banc* reconsideration of *Busby* - - to be virtually nil.

The Court will, however, grant the motion to dismiss the conspiracy claim under RICO in Count II, given that the "intracorporate conspiracy" doctrine bars such a claim in the circumstances of this case, the defendants all being charged with actions falling within the ambit of their respective corporate roles. *See, e.g. Marmott v. Maryland Lumber Co.*, 807 4.2d 1198 (4th Cir. 1986), *cert. denied*, 482 U.S. 929 (1987). The Court declines to reach a result under Maryland Law that differs from the result of the Fourth Circuit in practically identical circumstances under West Virginia law. *New Beckley Mining Corp v. International Union, UMW*, 18 F.3d 1161 (4th Cir. 1994).

For the reasons stated, the defendants' motion to dismiss is granted as to Count II, but denied as to Count I.

SO ORDERED, this 19th day of February, 1999.

\s\ _____

Frederic N. Smalkin
United States District Judge

IN THE UNITED STATES DISTRICT COURT
THE DISTRICT OF MARYLAND,
NORTHERN DIVISION

[Entered: November 8, 2000]

POTOMAC ELECTRIC POWER COMPANY :

v. :

ELECTRIC MOTOR SUPPLY, INC., et al. :

CIVIL NO. S 98-2519

MEMORANDUM OPINION

Plaintiff, Potomac Electric Power Company ("PEPCO"), SUED THE defendants, Electric Motor & Supply, Inc. ("EMS"), Charles M. Rhodes ("Rhodes"), Ralph Force ("Force"), and Darryl Price ("Price"), alleging violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), Title 18, Section 1962(a) and 1962(d). PEPCO's cause of action under § 1962(d) was subsequently dismissed by this Court. After extensive discovery on the remaining claim under § 1962(a), Defendants filed two separate motions for summary judgment, one for lack of proof of fraud, the other for lack of proof of damages.

The issues have been well briefed by the parties, and no oral hearing is necessary. Local Rule 105.6 (D. Md.). For the reasons stated below, Defendants' Motion for Summary Judgment on the issue of damages will be GRANTED and the motion for lack of proof of fraud need not be considered by the Court.

BACKGROUND

PEPCO, a regulated utility company that provides electrical power to customers in the greater Washington, D.C. metropolitan area, and EMS, an industrial motor repair company located in Altoona, Pennsylvania, enjoyed a business relationship from 1985 until 1996. During that period, EMS provided motor repair services for hundreds of PEPCO electric motors as a result of EMS' successful bids on PEPCO's repair work.

PEPCO alleges that in March, 1994, it received an anonymous package suggesting that certain of its employees had engaged in fraudulent bid-rigging with certain EMS employees. Pursuant to this information, PEPCO launched an investigation led by Ed Stowe, one of PEPCO's security department investigators. PEPCO alleges that, based on its investigation, in connection with which a report was filed on August 31, 1994, it discovered that EMS committed fraud in. connection with in repair of PEPCO motors. In particular, PEPCO alleges that EMS failed to repair the motors in accordance with PEPCO specifications, and then falsified documentation including inspection reports and invoices, in an attempt to cover up its fraudulent activities. The specifications with which EMS allegedly failed to comply required that EMS use epoxy as the varnish treatment for the motors and that EMS perform two treatments of Vacuum Pressure Impregnation ("VPI") with epoxy. PEPCO claims that EMS represented in its inspection reports and invoices that it completed two VPI epoxy treatments, while EMS' own internal time entry reports show that EMS did not in fact repair the motors according to that specification. PEPCO further asserts that EMS failed to perform required polarization index tests and surge tests

according to the required specifications and falsified documentation as to the results of AC High-Potential Tests and required electrical calibrations.

PEPCO contends that EMS' alleged practices constituted a pattern or practice of fraudulent activity that benefited EMS, as it was able to present the lowest bids to PEPCO and obtain the repair work. PEPCO also maintains that EMS invested money it saved from its practice of conducting fraudulent repairs back into the company in furtherance of its business. PEPCO brought this civil RICO suit against EMS pursuant to § 1964(c) which states that:

> [a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor.. and shall recover threefold the damages he sustains and le cost of the suit, including a reasonable attorney's fee ....

18 U.S.C. § 1964(c).

Section 1962(a) makes it:

> unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity... to use or invest, directly or .indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18 U.S.C. § 1962(a).

Because PEPCO has failed to present any evidence that it sustained any injury to its business or property that is cognizable under § 1964(c), Defendants' motion for summary judgment for lack of proof of damages will be GRANTED.

SUMMARY JUDGMENT STANDARD

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate there is no genuine issue as to any material fact and the moving party is entitled to summary judgment as a matter of law. In *Anderson v. Liberty Lobby, Inc.*, 477 U. S 242, 249 (1986), the Supreme Court explained that, in considering a motion. for summary judgment, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving pan," *Id.* at 248. Thus, "the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the [nonmoving party] on the evidence presented." *Id.* at 252. In undertaking this inquiry, a court must view the facts and *the* reasonable inferences drawn therefrom "in the light most favorable to the party opposing the motion," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), but the opponent must bring forth evidence upon which a reasonable fact finder could rely. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The mere existence of a "'scintilla" of evidence in.

support of the nonmoving party's case is not sufficient to preclude an order granting summary judgment. *Anderson*, 477 U.S. at 253.

ANALYSIS

I. Damages Must be Shown Under RICO

As set forth above, in order for a plaintiff to recover for a RICO violation, the plaintiff must show that it was "injured in [its] business or property by reason of a violation of section 1962 of this chapter...." 18 U.S.C. § 1964(c). In considering what must be proved by a RICO plaintiff under § 1964(c), the Supreme Court has stated that "the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). The Supreme Court refined this requirement in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 2587 268 (1992), concluding that section 1964(c) requires a showing that the defendant's conduct was the proximate cause of plaintiff s injury. The Fourth Circuit, therefore, has held that a claim under RICO requires the plaintiff to show "damage proximately caused by the violation." *Caviness v. Derand Resources Corp.*, 983 F.2d 1295, 1305 (4th Cir. 1993).

The Second Circuit has examined the damage analysis under RICO in more detail. That court has compared the damage analysis under RICO to the analysis used "in other areas of the law," stating that RICO compensation "takes the form of awarding damages sufficient to place the plaintiff in the same financial position he would have occupied absent the illegal conduct." *Bankers Trust Co. v. Rhoades*, 859 F.2d

1096, 1106 (2nd Cir. 1988). In *Bankers Trust,* the court concluded that because damages were "speculative" and "unprovable,' the cause of action could not be made until damages became more definite. *Id.* In *Commercial Union Assurance Co. v. Milken,* 17 F.3d 608 (2nd Cir. 1994) the Second Circuit, relying on *Bankers Trust;* affirmed the dismissal of a private civil action under RICO because the plaintiffs "lack[ed] that most fundamental of legal elements necessary to support a viable cause of action - - any demonstrable damages." *Id.* at 612. In that case, the plaintiffs had recouped their investment and received a substantial return. *See id.* The court concluded that "while we have no difficulty in finding that plaintiffs' causes of action might well subject defendants to liability, plaintiffs can prove no damages." *Id.* at 609. The Ninth Circuit has also further refined the injury analysis under § 1964(c), stating that "a showing of 'injury' requires proof of concrete financial loss . . ."*Oscar v. University Students Co-operative Assn, 965* F.2d 783, 785 (9th Cir. 1992). The federal courts, then, have made clear that the Plaintiff in a civil RICO action must demonstrate that he suffered some compensable damage as a result of the racketeering activity.

In asserting its claim for damages, however, PEPCO is not required to show that the damages flowed from the defendant's investment use of racketeering income. This Court is bound to follow Fourth Circuit precedent, as set forth in *Busby v. Crown Supply, Inc.,* 896 F.2d 833, 837(4th Cir. 1990), which makes clear that a private plaintiff may assert an adequate claim under 1962(a) for relief notwithstanding the absence of any allegation of "investment use" of illegally derived funds. See Mem. and Order, February 19, 1999.

II. Lack of Proof of Damages

PEPCO has failed to provide sufficient evidence to generate a liable issue that it suffered a compensable injury, and has thus failed to satisfy an essential element of its RICO claim. Furthermore, by failing to set forth any specific proof of damages, PEPCO cannot show that any damages it suffered were proximately caused by EMS' conduct.

The Complaint states the as a result of de defendants alleged behavior, the "motors enjoyed a lesser useful life than was expected and failed more frequently and sooner than would have ordinarily been expected." Compl. at ¶ 100. The Complaint alleges further that "Defendants' violation of 18 U.S.C. § 1962(a) caused PEPCO to suffer direct injury to its business and property through more than One Million Dollars ($1,000,000.00) in payments for, repair work either not performed at all or improperly performed, plus other damages and losses described above." Compl. at ¶ 112.

In PEPCO's answers to interrogatories, it explained that it suffered damages associated with:

> (1) the re-repair of motors; (2) the purchasing of new/replacement motors; (3) the premature failure of motors; (4) the shortening of a motor's "life"; (5) the labor and material expenses resulting from non-scheduled shut-downs of a generating unit; (6) the loss of income resulting from a failure to generate electricity during a non-scheduled shut-down; and (7) the cost to purchase electricity from other utilities during non-scheduled shut-downs.

Def's Mot., Ex. 6 at 8.

PEPCO has failed to support these bar: damage claims with any evidence of loss. The damage report prepared by PEPCO's expert, Mr. Sherman, was lacking in any reference to. specific losses suffered by PEPCO. In particular, the report provided no evidence regarding the number of motors that were not repaired in accordance with specifications, any additional expenses that were incurred to repair those machines that were not properly repaired by EMS, or the difference in value between motors that were repaired in accordance with specifications and those that were not. Mr. Sherman "calculated damages based on a return of all amounts paid by PEPCO to EMS," which is essentially the aggregated price of all of the contracts. Def's Mot., Ex. 2 at 6. This is hardly an allowable measure of damages under these circumstances. Even assuming that the motors were not repaired in accordance with the contract; the damages award would normally be based on a benefit-of-the-bargain formula, *ie.*, the difference between the value of the motors as repaired according to specifications and the value of the motors actually repaired by EMS. *Cf.* U.S.C. § 2-714(2) (damages for breach of warranty in a she of goods contract being the difference "between the value of the goods accepted and the value they would have had if they had been as warranted . . . ."). Maryland courts have adopted a "flexibility theory" for determining the measure of damages in cases of fraud and deceit. *Hinkle v. Rockville Motor Co.*, 262 Md. 502, 511-512 (1971). Under this theory, the court may elect between "out of pocket" or "benefit of the bargain" damages. *Id.* Even if an out of pocket measure of damages is applied to this case, PEPCO must still provide "some evidence of the actual value of the services rendered or goods

obtained." *Western Contracting Corp. v. Bechtel Corp.*, 885 F.2d 1196, 1204 (4th Cir. 1989) (applying Maryland's "flexibility theory"). PEPCO has produced no evidence of the value of the motors they accepted back from EMS upon completion of EMS' repair work. In fact, when asked to give a value to the EMS repair work through deposition testimony, PEPCO's expert, Mr. Sherman, rep-lied "that it is either unreasonable or not possible to go back and make a determination of the difference in either useful life or value between what was contractually called for and what was actually done." Def 's Mot., Ex. 4 at 74. Mr. Sherman also stated that he had essentially assigned a dollar amount of zero to the value of be repair work performed by *EMS. See id*

PEPCO's expert also determined that PEPCO's damage calculation should include additional expenses incurred as a result of failure of the equipment. Def's Mot., Ex, 2 at 6-7. Specifically, he explained that when a motor is taken off-line, PEPCO must either replace the motor, increase power production at another plant, or purchase energy from another source. See id Mr. Sherman then provided a figure for the total amount of money paid by PEPCO to purchase additional energy for the period from 1994 - June 1991. However, a most important element was missing from this analysis - the portion of these costs that were attributable to EMS' alleged wrongful acts. *See id* at 8. Furthermore, in his report, Mr. Sherman explained that PEPCO motors suffered from a diminished useful life as a result of EMS' activity. However, Mr. Sherman was unable to quantify this loss because "experts with whom we have conferred state that quantification of the loss of useful life is speculative and unreliable." *Id.*

Just as the damages in *Bankers Trust*, cited supra were unrecoverable because they were "speculative" and "unprovable," so too are the damages in this case. PEPCO's own experts stated that the calculation of damages for loss of useful life were "speculative and unreliable."

PEPCO has provided no specific evidence of losses sustained as a result of the allegedly inadequate repairs performed by EMS. The Fourth Circuit affirmed a district court's dismissal of a RICO complaint on similar grounds where the plaintiffs were still receiving a return on their investment, and what no evidence was presented that the alleged misconduct of the defendants "had anything to do with the business downturn or the value of his or her investment." *Caviness*, 983 F.2d at 1305. In its response, PEPCO states that EMS "confuse[d] proof of injury with proof of damages." Pl.'s Opp'n at 11. Fourth Circuit case law makes clear, however, that plaintiffs asserting claims under § 1964(c) must prove "damage proximately caused by the violation." See (*Caviness*, 983 F.2d at 1305. Plaintiffs have failed to provide adequate proof of such damage.

III. Equitable Relief under RICO

In is response to the defendant's motion for summary judgment lack of proof of damages, PEPCO focused on requesting equitable relief in the form of rescission of the contact rather than providing specific evidence of damages it suffered. Equitable relief in the form of rescission is unavailable to the plaintiffs, first, because Fourth Circuit precedent suggests that equitable relief is not available in a

private action under RICO, and second, because rescission is not an appropriate remedy under the facts of this case.

The Fourth Circuit has recently noted that section 1964(c) of RICO "makes no mention whatever of injunctive or declaratory relief." *Johnson v. Collins Entm't Co.*, 199 F.3d 710, 726 (4th Cir. 1999). The court, quoting its prior decision in *Dan River, Inc. v. Icahn*, 701 F.2d 278, 290 (4th Cir. 1983), reiterated that "'[t]here is substantial doubt whether RICO grants private parties . . . a cause of action or equitable relief'" *Johnson*, 199 F.3d at 726 (quoting *Dan River*, 701 F.2d at 290). The court noted that "[t]this doubt is especially acute in light of the fact that Congress has declined to authorize injunctive remedies for private parties" under RICO. *Johnson*, 199 F.3d at 726. The court, looking to other circuit courts for guidance, stated further that "the only circuit to have squarely addressed the question held that 'injunctive relief is not available to a private party in a civil RICO action.'" *Id.* (quoting *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1084 (9th Cir. 1986). Based on this precedent, it is unlikely that the Fourth Circuit would allow PEPCO to assert a claim for equitable relief under RICO were the question squarely put before it.

Even if equitable relief were available to PEPCO under RICO, the specific equitable remedy sought, rescission of the contracts entered into between the parties, is unavailable in this case. In *Caviness*, the Fourth Circuit distinguished a securities law claim for rescission, which may be justified without a showing that the plaintiff was damaged, from a RICO claim, which the court stated required both reliance and damages proximately caused by the defendant's conduct *See Caviness*, 983 F.2d at 1305. Thus, even if

rescission were available here, PEPCO would still need to demonstrate that it is was damaged by EMS' conduct. As was determined above, PEPCO has been unable to produce evidence sufficient to generate a triable issue on damages.

Furthermore, PEPCO has not satisfied the common law requirements which would permit it to rescind its contracts with EMS. First, Maryland law requires a plaintiff requesting rescission to "promptly and properly manifest his determination to repudiate the contract ..." *Lazorcak v. Feuerstein,* 273 Md. 69, 75 (1974); *see also Johns Hopkins Univ. v. Hutton,* 488 F.2d 912, 916 n. 12 (4th Cir. 1973) stating that "in the general area of rescission it appears that the requirement of prompt action is an element of the plaintiffs case, and the burden is upon the rescinding party to show that he acted promptly in seeking rescission."). PEPCO failed to promptly seek rescission of me contracts in this case. PEPCO discovered this allegedly fraudulent activity in August of 1994, yet it continued to contract with, EMS for repairs through 1996. *See* Pl.'s Opp'n at 2. Furthermore, PEPCO's complaint was not filed until July of 1998, nearly four years after the' investigation into the allegedly fraudulent conduct. Even at the time the Complaint was filed, the plaintiffs did not seek rescission. The request for rescission did not appear until PEPCO filed its opposition to the defendant's summary judgment motion in October of 2000. This is hardly a prompt and proper manifestation of a determination to repudiate the contract.

Second, the object of rescission is to bring the parties back to the position they occupied before the contract was signed. Maryland courts have stated that:

> as a general rule, the party seeking rescission must indicate to the other party at least the intent to restore the parties to the relative positions which they would have occupied if no such contract bad ever been made; and this as soon as the disenchanted party learns of the facts. This offer of restoration or tender back must, at a minimum, demonstrate an unconditional willingness to return to the other party both the consideration that was given by that party and any benefits received under the contact

Lazorcak, 273 Md. at 75-76 (citations omitted).

Under Maryland law, PEPCO cannot now ask for the full aggregated price of the contracts without returning to EMS the benefit or value of the repairs it received under the contacts. The fact that there is no evidence capable of assigning any value to the repair services provided to PEPCO demonstrates that rescission is an unworkable remedy under these circumstances. Moreover, rescission is generally not a practical remedy when services have already been performed. Considering the difficulty inherent in returning the benefit of those services. *See Leaf Co. v. Montgomery County*, 70 Md. App. 170, 180 (1987) ("The contract is one for services already performed, which is not susceptible of rescission."). If rescission were ordered, and EMS required to pay back all monies paid to it by PEPCO without receiving anything in return for any benefit conferred on PEPCO, the parties would hardly be in the position, they were in prior to the entering into the contacts.

Finally, the court in *Lazorcak* noted dud by taking "any act which recognizes the continued validity of the contract ... [the party] will be held to have waived his right to rescind." *Lazorcak*, 273 Md. at 76. PEPCO in fact continued to recognize, and to perform under; the contract by paying for motors repaired into 1996, well after PEPCO discovered the alleged misconduct in 1994. *See eg.*, Compl. at ¶ 82. Therefore, even if equitable relief is available in a RICO action, PEPCO cannot request recession of the contracts under these circumstances.

CONCLUSION

Because the plaintiff has failed to adequately provide proof of damages, and because equitable relief in the form of rescission of the contract is unavailable in this case, a separate order will be issued GRANTING the defendant's motion for summary judgment on the issue of lack of proof of damages.

Date: November 8, 2000

\s\ _____
Frederic N. Smallkin
United States District Judge

IN THE UNITED STATES DISTRICT COURT
THE DISTRICT OF MARYLAND,
NORTHERN DIVISION

[Entered: November 8, 2000]

POTOMAC ELECTRIC POWER COMPANY :

v. :

ELECTRIC MOTOR SUPPLY, INC., et al. :

CIVIL NO. S 98-2519

ORDER AND JUDGMENT

For the reasons stated in the Memorandum Opinion issued this day, it is hereby, this 8th day of November 2000 ORDERED AND ADJUDGED

1. That Defendant's motion for summary judgment BE and it hereby IS GRANTED;

2. That judgment BE, and it hereby IS ENTERED in favor of the Defendants, Electrical Motor and Supply, Inc, et al., and against the Plaintiff Potomac Electric Power Company, with costs awarded to the defendants;

3. That the Clerk of the Court send copies of the said Memorandum Opinion and this Order to the Counsel for the Parties; and

4. That this case is HEREBY CLOSED.

\s\ _____
Frederic N. Smalkin
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-2452

POTOMAC ELECTRIC POWER COMPANY,
Plaintiff-Appellant,

v.

ELECTRIC MOTOR AND SUPPLY,
INCORPORATED; RALPH FORCE;
CHARLES M. RHODES,
Defendants-Appellees,

and

DARRYL PRICE,
Defendant.

No. 00-2557

POTOMAC ELECTRIC POWER COMPANY,
Plaintiff-Appellee,

v.

ELECTRIC MOTOR AND SUPPLY,
INCORPORATED; RALPH FORCE;
CHARLES M. RHODES,
Defendants-Appellants,

and

DARRYL PRICE,
Defendant.

[Entered: October 22, 2001]

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court

\s\ _____
Patricia S. Connor
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Entered July 28, 1998]

Potomac Electric Power Company,
1900 Pennsylvania Ave., N.W.
Washington, DC 20068,
Plaintiff,

v.

Case No. _____

Electric Motor and Supply, Inc.,
1000 50th Street
Altoona, Pennsylvania 16603
SERVE ON:
Ralph Force, President
1000 50th Street
Altoona, Pennsylvania 16603

and

Ralph Force,
1000 50th Street
Altoona, Pennsylvania 16603

and

Charles M. Rhodes
1000 50th Street
Altoona, Pennsylvania 16603

and

Darryl Price
1321 N. Rolling Road
Catonsville, Maryland 21228
Defendants

COMPLAINT

Plaintiff, Potomac Electric Power Company, by its undersigned attorneys, hereby sues Defendants, Electric Motor and Supply, Inc., Ralph Force, Charles M. Rhodes, and Darryl Price and states as follows,

Nature of the Action

1. This lawsuit is brought pursuant to the Racketeer Influenced and Corrupt Organizations provisions of the Organized Crime Control Act of 1970 ("RICO") to redress damages suffered by Plaintiffs at the hands of Defendants. Defendants engaged for years in a pattern of repeated, and abusive fraudulent billing, corrupt Influence peddling and bid rigging (among other acts), Defendants used their position as contractors and repairmen to derive income from a pattern of racketeering activity including swindling hundreds of thousands of dollars from Plaintiff by. *inter alla,* falling to perform motor repair work yet billing for same, faultily performing motor repair work and then billing for work not performed to specifications, falsifying motor repair records to hide work not performed or poorly done or not adhering to specifications, and engaging in a pattern of deceit, lies and cover-up to hide their illegal conduct from both Plaintiff and the authorities. Defendants them invested such income back into their criminal enterprise for its further use in connection with their established pattern of racketeering activity. Plaintiff respectfully requests that it be awarded damages as required to compensate for losses sustained and to deter future conduct by defendants.

Jurisdiction and Venue

2. This Court has jurisdiction of the claims herein pursuant to 18 U.S.C. § 1964(c) and 28 U.S.C. § 1331. This civil action arises under the laws of the United States. Plaintiff is alleging a violation of its rights under Titled IX of the Organized Crime Control Act of 1970, as amended, 18 U.S.C. § § 1961, *et seq.*

3. Venue herein is proper under 18 U.S.C. § 1965(a) and 28 U.S.C. and § 1391(b).

Parties

4. Plaintiff, Potomac Electric Power Company ("PEPCO"), is a citizen of the United States, a corporation organized under the laws of the District of Columbia, and a resident of the District of Columbia. PEPCO is a regulated utility, providing electrical power to customers in the greater Washington, D.C. metropolitan area. PEPCO provides electric power to and maintains extensive operations in this District.

5. Defendant, Electric Motor and Supply, Inc. ("EMS"), is a citizen of the United States, a corporation organized under the laws of the Commonwealth of Pennsylvania, and is a resident of the Commonwealth of Pennsylvania. EMS is registered to conduct business in the state of Maryland.

6. Defendant Ralph Force ("Force"), is a citizen of the United States and a resident of the Commonwealth of Pennsylvania. Force is, and at all relevant times was, chief executive officer and owner of EMS and directed and approved of the fraudulent practices recited herein.

7. Defendant, Michael Rhodes is a citizen of the United States and resident of the Commonwealth of Pennsylvania. He is. and at all relevant times was, responsible for engineering at EMS and directed or approved of the fraudulent practices recited herein.

8. Defendant Darryl Price is a citizen of the United States and a resident of die State of Maryland. He was at all relevant times, responsible for production and customer services at EMS and directed or approved of the fraudulent practices recited herein.

Facts Common to All Counts

9. EMS is primarily engaged in ft business of industrial motor repair. From 1985 to 1996 EMS was an authorized vendor to PEPCO, providing mainly repair services on PEPCO motors used in the production of electricity.

10. Force is president, chief executive officer, and sole owner of EMS. Force is involved in the day to day business of EMS

11. Rhodes is the engineering manager at EMS.

12. Price was responsible for production and customer services at ENS during the time in which it did business with PEPCO,

13. From time to time to time, beginning in approximately 1985 and continuing through approximately 1996, PEPCO sent electric motors and other related industrial equipment used in the production of electricity to EMS for repair.

12. These motors were sent to or picked up by EMS, at various PEPCO electric generating stations and other facilities located throughout Washington, DC, Maryland and Virginia, and worked on at EMS's location In Altoona, Pennsylvania.

Predicate Acts

13. At all times relevant to this Complaint, the process by which a large PEPCO motor repair was initiated was, generally, through competitive bidding. Ether in writing or over the telephone, PEPCO would solicit bids from repair vendors regarding the price the vendors would charge to perform the repair. The would be vendors would respond by telephone or via the United States Mail. Used on seemed factors, including price and alleged quality of workmanship, PEPCO would select a repair shop, and send its motor to that repair shop for repair.

14 When PEPCO sent a motor to a vendor (including, but not limited to EMS) for repair, PEPCO required (1) that certain reports be completed by the vendor upon receipt of the motor, in part so that PEPCO could obtain the diagnosis of the problem with the motor and the vendor could identify for PEPCO the suggested course of action for repair, (2) that the repair be performed in accordance with detailed specifications provided by PEPCO; and (3) that the vendor conduct certain specific tests upon die motor after the repair had been effected, to ensure that the motor was ready for a return to service and was safe for same.

15. After a motor had been repaired, EMS would send PEPCO by the U.S. Mail an invoice for the amount due for said repair, as well as documentation as to the repairs which were performed and the tests which were run, and PEPCO would remit payment, also by mail.

16. At all times relevant to this Complaint, EMS represented itself to be expert in the field of electronic motor repair, EMS was in a position of unique knowledge and skill which PEPCO did not possess. PEPCO reasonably relied upon EMS to provide honest and complete information relating to motors submitted by PEPCO, to repair same in an effective efficient and timely manner, and to conduct lie appropriate tests to verify that the motor had been properly repaired,

17. As set forth in explicit detail below, from approximately 1985 until sometime in 1996 PEPCO submitted hundreds of motors to EMS for repair. As is further set forth below, EMS, with the intent and purpose of deceiving PEPCO, failed to complete the required initial motor inspection reports in an accurate manner, and, to the extent that such motor inspection reports were later partially or wholly completed, fraudulently and deceptively completed the motor inspection reports, by *inter alia*, flailing to provide information regarding the cause of the motor's problem or by providing false information regarding the same.

18. By falsely advising PEPCO of the cause of the motors problem, EMS was able, in each instance, to fabricate numerous alleged "causes" of the motors problems thereby allowing EMS to conduct unnecessary, sham repairs for which PEPCO was charged and for which PEPCO paid. Furthermore, by falsely advising PEPCO of the cause of the motor's problem, EMS was able, in each instance, to; hide and cover-up faulty and worthless "repairs", falsified test reports, and other data which would have, in the normal course, indicated to PEPCO that the motor had not been fully and correctly repaired.

19. Set forth in detail below are examples of instances in which EMS performed a faulty repair or no repair at all, and where EMS fabricated information submitted to PEPCO in PEPCO's required motor repair report to make it appear that the repairs requested by PEPCO, and/or required to properly repair the motor, had been completed.

20. All of the actions attributed to EMS were performed under the direction and control of the individual defendants who agreed and conspired to implement the scheme and artifice.

21. Specific examples of EMS' failure to provide the required repairs in accordance with PEPCO's specification, included EMS' use of polyester resins instead of the required epoxy resins, the failure to do the required two vacuum pressure impregnation treatments ("VPI"), spraying or otherwise painting the motor with an epoxy coating to mask EMS' failure to treat the motor with epoxy, the use of fraudulent test data including testing accomplished with uncalibrated equipment the reporting of false test results as a result of tests that were either not done at all, or were inaccurately provided, the forwarding of fraudulent oven temperature charts to misrepresent that the motors had been baked or burned out at the appropriate temperatures further using fraudulent oven temperature readings to mask the fact that the oven had been utilized at an inappropriate temperature thereby causing damage to PEPCO's motors, on occasion with smaller motors merely removing the ends of the motors and bells of the motors, filling the motors with lubricants, and cleaning solvents, reattaching the end bells and painting the motors, while billing PEPCO for a complete motor repair and restoration.

22. For example, an or about February 24, 1995 EMS secured a contract with PEPCO to repair a 10 horsepower (hp) Louis Allis electric motor from PEPCO's Production Service Center and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications, EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications. EMS then forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Four Hundred Twenty-Eight Dollars ($428.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS' false certification that the motor had been correctly repaired and tested; to its specifications, on or about April 14, 1995 PEPCO paid the invoice in the amount of $428,00.

23. For example, on or about February 24, 1995 EMS secured a contract with PEPCO to repair a 5 hp, Bell & Gossett electric motor from PEPCO's Potomac River facility and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications, EM5 subsequently serviced the motor but deliberately and willfully failed to provide the repairs,, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Three Hundred Fifty-Eight Dollars and Ninety Cents ($358.90) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done Relying on EMS'

false certification that the motor had been correctly repaired and tested, to Its specifications, on or about April 15, 1994 PEPCO paid the invoice in the amount of $358.90.

24. For example, on or about August 19, 1994, EMS secured a contract with PEPCO to repair a 20 hp, General Electric ("GE") electric motor from PEPCO's Production Service Center facility and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications, EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications EMS then forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Six Hundred Eighty Six Dollars ($686.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done, relying an EMS' false certification that the motor had been correctly repaired and tested, to its specifications, on or about September 1, 1994 PEPCO paid the invoice in the amount of $686.00.

25. For example, an or about February 3, 1995, EMS secured a contact with PEPCO to repair a 0.5 hp Falk electric motor from PEPCO's Chalk Point facility and certified to PECO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications, EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs testing and/or replacement materials or parts as required by the PEPCO Specifications. EMS then forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Three Hundred Twenty-Three Dollars and Twenty-Two Cents ($323.22)

and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS' false certification that the motor had been correctly repaired and tested, to its specifications, on or about March 15, 1995 PEPCO paid the invoice in the amount of $323.22.

26. For example, an or about September 7, 1994, EMS secured a contract with PEPCO to repair a 15 hp AUMA electric Motor from PEPCO'S Dickerson facility and certified to PEPCO ft all repairs would be accomplished in accordance with PEPCO Motor Repair Specification EMS subsequently serviced the motor but deliberately and willfully failed to Provide the repairs, testing and/or replacement material or parts as required by PEPCO Specifications; EMS then forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Eight Hundred Seventy Dollars ($870.00) and falsely certified to PEPCO that die requested repairs had been performed and the required testing had truly been dons Relying on EMS' false certification that the motor had been correctly repaired and tested, to its specifications, an or about October 12, 1994 PEPCO paid the. invoice in the amount of $870.00.

27. For example on or about July 7, 1994, EMS secured a contract with PEPCO to repair a 1.5 hp Marathon electric motor from PEPCO's Chalk Point facility and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the. repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications. EMS then forwarded to PEPCO an invoice by the United

States Mail for the for repair in the amount of Three Hundred Sixty Four Dollars ($364.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS' false certification that the motor had been correctly repaired and tested, to its specification on or about July 29, 1994 PEPCO paid the invoice in the amount of $364.00.

28. For example on or about July 20, 1994 EMS secured a contact with PEPCO W repair a 0.7 hp Litimorque electric motor from PEPCO's Chalk Point facility and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications. EMS then forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Five Hundred Forty-One Dollars ($541.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS' false certification that the motor had been correctly repaired and tested, to its specifications, on or about September 1, 1994 PEPCO paid the invoice in the amount of $541.00.

29. For example, on or about July 12, 1994, EMS secured a contract with PEPCO to repair a 1.5 hp Marathon electric motor from PEPCO's Chalk Point facility and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications, EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS

then forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Nine Hundred Eighty-Six Dollars ($986.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS' false certification that the motor had been correctly repaired and tested, to its specifications, on or about August 16 1994 PEPCO paid the invoice in the amount of $986.00.

30. For example, on or about February 1, 1995, EMS secured a contract with PEPCO to repair a 7.5 hp, GE electric motor from PEPCO's Chalk Point facility and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Five Hundred Forty-Four Dollars ($544.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about February 13, 1995 PEPCO paid the invoice in the amount of $544.00.

31. For example, on or about July 26, 1994, EMS secured a contract with PEPCO to repair a 9.45 hp, Limitorque electric motor from PEPCO's Chalk Point facility and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement

materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of One Thousand Three Hundred Sixty-Five Dollars ($1,3665.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about September 15, 1994 PEPCO paid the invoice in the amount of $1,365,00.

32. For example, on or about August 18, 1994, EMS secured a contract with PEPCO to repair a 1.5 hp, Reliance electric motor from PEPCO's Chalk Point facility and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Six Hundred Twenty-Seven Dollars ($627.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about September 20, 1994 PEPCO paid the invoice in the amount of $627.00.

33. For example, on or about August 18, 1994, EMS secured a contract with PEPCO to repair a 1.5 hp, Reliance electric motor from PEPCO's Chalk Point facility and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO

Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Two Hundred Seventy-One Dollars ($271.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about September 20, 1994 PEPCO paid the invoice in the amount of $271.00.

34. For example, on or about December 28, 1994, EMS secured a contract with PEPCO to repair a 40 hp, Westinghouse electric motor from PEPCO's Dickerson facility and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of One Thousand Three Hundred Six Dollars and Eighty-Five Cents ($1,306.85) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about February 14, 19995 PEPCO paid the invoice in the amount of 1,306.85.

35. For example, on or about December 28, 1994, EMS secured a contract with PEPCO to repair a 10 hp, Louis Allis electric motor from PEPCO's Dickerson facility and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Eight Hundred Seventy-Nine Dollars ($879.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about February 6, 1995 PEPCO paid the invoice in the amount of $879.00.

36. For example, on or about November 25, 1994, EMS secured a contract with PEPCO to repair a 5 hp, GE electric motor from PEPCO's Potomac River facility and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Eight Hundred Fifty Dollars ($850.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about January 9, 1995 PEPCO paid the invoice in the amount of $850.00.

37. For example, on or about November 25, 1994, EMS secured a contract with PEPCO to repair a 40 hp, Elliott electric motor from PEPCO's Dickerson facility and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Two Thousand Seven Hundred Twenty Dollars ($2,720.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about January 8, 1995 PEPCO paid the invoice in the amount of $2720.00.

38. For example, on or about June 5, 1995, EMS secured a contract with PEPCO to repair a 2 hp, GE electric motor from PEPCO's Production Service Center and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Three Hundred Seventy Dollars ($370.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about July 10, 1995 PEPCO paid the invoice in the amount of $370.00

39. For example, on or about October 12, 1994, EMS secured a contract with PEPCO to repair a 10 hp, GE electric motor from PEPCO's Production Service Center and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Six Hundred Seventy-Six Dollars ($676.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about November 11, 1994 PEPCO paid the invoice in the amount of $676.00.

40. For example, on or about June 30, 1995, EMS secured a contract with PEPCO to repair a 25 hp, GE electric motor from PEPCO's Production Service Center and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Six Hundred Fifty-Eight Dollars ($658.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly

repaired and tested, to its specifications, on or about August 20, 1995 PEPCO paid the invoice in the amount of $658.00.

41. For example, on or about July 25, 1995, EMS secured a contract with PEPCO to repair a 30 hp, GE electric motor from PEPCO's Production Service Center and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Five Hundred Eighty Six Dollars ($586.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about August 20, 1995 PEPCO paid the invoice in the amount of $586.00.

42. For example, on or about April 28, 1994, EMS secured a contract with PEPCO to repair a 1.5 hp, Seemas electric motor from PEPCO's Production Service Center and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Two Hundred Thirty Four Dollars ($234.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing

had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about July 3, 1994 PEPCO paid the invoice in the amount of $234.00.

43. For example, on or about October 5, 1994, EMS secured a contract with PEPCO to repair a 10 hp, GE electric motor from PEPCO's Production Service Center and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Three Hundred Thirty-One Dollars ($331.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about October 31, 1994 PEPCO paid the invoice in the amount of $676.00.

44. For example, on or about August 19, 1994, EMS secured a contract with PEPCO to repair a 20 hp, GE electric motor from PEPCO's Production Service Center and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Six Hundred Eighty-Six Dollars ($686.00) and falsely certified to PEPCO that the requested

repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about September 1, 1994 PEPCO paid the invoice in the amount of $686.00.

45. For example, on or about September 8, 1994, EMS secured a contract with PEPCO to repair a 7.5 hp, GE electric motor from PEPCO's Production Service Center and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Three Hundred Ninety-Eight Dollars and Eighty-Two Cents ($398.82) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about September 20, 1994 PEPCO paid the invoice in the amount of $398.82.

46. For example, on or about June 14, 1994, EMS secured a contract with PEPCO to repair a 100 hp, EM electric motor from PEPCO's Production Service Center and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Nine Hundred

Eighty-One Dollars ($981.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about July 15, 1994 PEPCO paid the invoice in the amount of $981.00.

47. For example, on or about November 3, 1994, EMS secured a contract with PEPCO to repair a 3 hp, Master Motor electric motor from PEPCO's Chalk Point facility and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Two Thousand Five Hundred Ninety-Two Dollars ($2,592.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about December 15, 1995 PEPCO paid the invoice in the amount of $2592.00.

48. For example, on or about April 7, 1995, EMS secured a contract with PEPCO to repair a 0.75 hp, Doerr electric motor from PEPCO's Benning facility and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then,

forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Two Hundred Eighteen Dollars ($218.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about May 14, 1995 PEPCO paid the invoice in the amount of $218.00.

49. For example, on or about June 10, 1994, EMS secured a contract with PEPCO to repair a 3 hp, Westinghouse electric motor from PEPCO's Production Service Center and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Three Hundred Eighty-Three Dollars and Thirty-Six Cents ($383.36) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about July 10, 1994 PEPCO paid the invoice in the amount of $383.36.

50. For example, on or about August 17, 1994, EMS secured a contract with PEPCO to repair a 3 hp, Westinghouse electric motor from PEPCO's Production Service Center and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and

willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Two Hundred Twenty-Six Dollars and Fifty-Six Cents ($226.56) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about September 12, 1994 PEPCO paid the invoice in the amount of $226.56.

51. For example, on or about February 21, 1996, EMS secured a contract with PEPCO to repair a 300 hp, EM electric motor from PEPCO's Morgantown Facility and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Five Thousand Eight Hundred Ninety Dollars ($5,890.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about April 15, 1996 PEPCO paid the invoice in the amount of $5,890.00.

52. For example, on or about February 21, 1996, EMS secured a contract with PEPCO to repair a 60 hp, Westinghouse electric motor from PEPCO's Potomac River facility and certified to PEPCO that all repairs would be accomplished in accordance with

PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Five Thousand Two Hundred Dollars ($5,200.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about March 14, 1996 PEPCO paid the invoice in the amount of $5,200.00.

53. For example, on or about September 7, 1994, EMS secured a contract with PEPCO to repair a 17KW hp, GE electric motor from PEPCO's Production Service Center and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Four Thousand Two Hundred Twenty-Five Dollars ($4,225.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about October 26, 1994 PEPCO paid the invoice in the amount of $4,225.00.

54. For example, on or about May 16, 1994, EMS secured a contract with PEPCO to repair a 30 hp, GE electric motor from PEPCO's Production Service Center and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Eight Hundred Sixty Five Dollars ($865.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about July 27, 1994 PEPCO paid the invoice in the amount of $865.00.

55. For example, on or about March 20, 1995, EMS secured a contract with PEPCO to repair a 10 hp, GE electric motor from PEPCO's Chalk Point facility and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Six Hundred Eighty-Five Dollars ($685.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been

correctly repaired and tested, to its specifications, on or about April 30, 1995 PEPCO paid the invoice in the amount of $685.00.

56. For example, on or about April 12, 1995, EMS secured a contract with PEPCO to repair a 7.5 hp, Baldor electric motor from PEPCO's Chalk Point Facility and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Nine Hundred Seventy-Five Dollars ($975.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about May 18, 1995 PEPCO paid the invoice in the amount of $975.00.

57. For example, on or about April 26, 1994, EMS secured a contract with PEPCO to repair a 40 hp, GE electric motor from PEPCO's Production Service Center and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Six Hundred Sixty-Eight Dollars ($668.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS

false certification that the motor had been correctly repaired and tested, to its specifications, on or about July 6, 1994 PEPCO paid the invoice in the amount of $902.00.

58. For example, on or about September 30, 1994, EMS secured a contract with PEPCO to repair a 1.5 hp, Reliance electric motor from PEPCO's Chalk Point facility and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Six Hundred Twenty-One Dollars ($621.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about October 25, 1994 PEPCO paid the invoice in the amount of $621.00.

59. For example, on or about September 21, 1994, EMS secured a contract with PEPCO to repair a 1.5 hp, Reliance electric motor from PEPCO's Chalk Point facility and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Two Hundred Seventy-One Dollars ($271.00) and falsely certified to PEPCO that the

requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about October 14, 1994 PEPCO paid the invoice in the amount of $271.00.

60. For example, on or about September 12, 1994, EMS secured a contract with PEPCO to repair a 20 hp, GE electric motor from PEPCO's Production Service Center and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Six Hundred and Eighty-Six Dollars ($686.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about April 21, 1995 PEPCO paid the invoice in the amount of $686.00.

61. For example, on or about September 29, 1994, EMS secured a contract with PEPCO to repair a 15 hp, ALMA electric motor from PEPCO's Dickerson facility and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Eight Hundred Seventy Dollars ($870.00) and falsely certified

to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about November 7, 1994 PEPCO paid the invoice in the amount of $870.00.

62. For example, on or about September 21, 1994, EMS secured a contract with PEPCO to repair a 147KW hp, Reliance electric motor from PEPCO's Production Service Center and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Four Thousand Two Hundred Twenty-Five Dollars ($4225.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about November 16, 1994 PEPCO paid the invoice in the amount of $4,225.00.

63. For example, on or about October 25, 1994, EMS secured a contract with PEPCO to repair a 7.5 hp, Westinghouse electric motor from PEPCO's Production Service Center and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO

an invoice by the United States Mail for the repair in the amount of Three Hundred Ninety-Eight Dollars and Eighty-Two Cents ($398.82) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about December 21, 1994 PEPCO paid the invoice in the amount of $398.82.

64. For example, on or about November 4, 1994, EMS secured a contract with PEPCO to repair a 10 hp, GE electric motor from PEPCO's Production Service Center and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Six Hundred and Seventy-Six Dollars ($676.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about December 21, 1994 PEPCO paid the invoice in the amount of $676.00.

65. For example, on or about August 11, 1994, EMS secured a contract with PEPCO to repair a 1.5 hp, Marathon electric motor from PEPCO's Chalk Point facility and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed

to provide the repairs, te[illegible]g and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of NineHundred and Eighty-Six Dollars ($986.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about October 18, 1994 PEPCO paid the invoice in the amount of $986.00.

66. For example, on or about August 12, 1994, EMS secured a contract with PEPCO to repair a 9.45 hp, Limitorque electric motor from PEPCO's Chalk Point facility and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of One Thousand Three Hundred Sixty-Five Dollars ($1,365.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about August 31, 1994 PEPCO paid the invoice in the amount of $1,365.00.

67. For example, on or about July 14, 1994, EMS secured a contract with PEPCO to repair a 7.5 hp, Robbins & Myers electric motor from PEPCO's Production Service Center and certified to PEPCO that all repairs would be accomplished in accordance with

PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Three Hundred Eighty-Three Dollars and Thirty Six Cents ($383.36) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about July 28, 1994 PEPCO paid the invoice in the amount of $383.36.

68. For example, on or about June 7, 1994, EMS secured a contract with PEPCO to repair a 30 hp, Westinghouse electric motor from PEPCO's Benning Road facility and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Five Hundred Sixty-Two Dollars ($562.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification

that the motor had been correctly repaired and tested, to its specifications, on or about July 26, 1994 PEPCO paid the invoice in the amount of $562.00.

69. For example, on or about June 15, 1994, EMS secured a contract with PEPCO to repair a 30 hp, Westinghouse electric motor from PEPCO's Benning Road faciliyt and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Three Hundred Twenty-Two Dollars ($322.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about July 12, 1994 PEPCO paid the invoice in the amount of $322.00.

70. For example, on or about May 20, 1994, EMS secured a contract with PEPCO to repair a 0.5 hp, GE electric motor from PEPCO's Potomac River facility and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Five Hundred Ninety-Two Dollars ($592.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying

on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about July 22, 1994 PEPCO paid the invoice in the amount of $592.00.

71. For example, on or about April 25, 1994, EMS secured a contract with PEPCO to repair a 200 hp, Westinghouse electric motor from PEPCO's Chalk Point facility and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Three Thousand One Hundred Thirty-Four Dollars ($3,134.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about July 6, 1994 PEPCO paid the invoice in the amount of $3,134.00.

72. For example, on or about May 27, 1994, EMS secured a contract with PEPCO to repair a 15 hp, Elec. Spec. electric motor from PEPCO's Potomac River facility and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of One Thousand Four Hundred Fifty-Seven Dollars

($1,457.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about July 10, 1994 PEPCO paid the invoice in the amount of $1,457.00.

73. For example, on or about April 10, 1995, EMS secured a contract with PEPCO to repair a 300 hp, EM (Stator) electric motor from PEPCO's Forestville, Maryland facility and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Four Thousand One Hundred Fifty Dollars ($4,150.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about May 20, 1995 PEPCO paid the invoice in the amount of $4,150.00.

74. For example, on or about October 9, 1995, EMS secured a contract with PEPCO to repair a 60 hp, GE electric motor from PEPCO's Chalk Point facility and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then,

forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Three Thousand One Hundred Dollars ($3,100.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about October 20, 1995 PEPCO paid the invoice in the amount of $3,100.00.

75. For example, on or about October 5, 1995, EMS secured a contract with PEPCO to repair a 60 hp, Westinghouse electric motor from PEPCO's Forestville, Maryland facility and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Five Thousand Two Hundred Seventeen Dollars ($5,217.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about November 11, 1995 PEPCO paid the invoice in the amount of $5,217.00

76. For example, on or about September 18, 1995, EMS secured a contract with PEPCO to repair a 100 hp, GE electric motor from PEPCO's Chalk Point facility and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide

the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Three Thousand One Hundred Dollars ($3,100.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about October 30, 1995 PEPCO paid the invoice in the amount of $3,100.00

77. For example, on or about September 18, 1995, EMS secured a contract with PEPCO to repair a 60 hp, Westinghouse electric motor from PEPCO's Production Service Center and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Three Thousand Five Hundred Forty-One Dollars ($3,541.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about November 18, 1995 PEPCO paid the invoice in the amount of Four Thousand two Hundred Seventeen Dollars ($4217.00).

78. For example, on or about July 27, 1995, EMS secured a contract with PEPCO to repair a 125 hp, Marathon electric motor from PEPCO's Production Service Center and certified to PEPCO that all repairs

would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of One Thousand Four Hundred Twenty Dollars ($1,420.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about September 11, 1995 PEPCO paid the invoice in the amount of $1,420.00

79. For example, on or about August 17, 1995, EMS secured a contract with PEPCO to repair a 60 hp, EM electric motor from PEPCO's Production Service Center and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications, EMS then, forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of One Thousand Eighteen Dollars ($1,018.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about October 18, 1995 PEPCO paid the invoice in the amount of $1,018.00.

80. For example, on or about November 27, 1994, EMS secured a contract with PEPCO to repair a 7.5 hp, Robbins Myers electric motor from PEPCO's Production Service Center and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications. EMS then forwarded to PEPCO an invoice by-the United States Mail for the repair in the amount of Three Hundred Eighty-Three Dollars ($383.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS' false certification that the motor had been correctly repaired and tested, to its specifications, on or about January 5, 1995 PEPCO paid the invoice in the amount of $383.00.

81. For example, on or about September 9, 1994, EMS secured a contract with PEPCO to repair a 1/6 hp, Reliance electric motor from PEPCO's Potomac River facility and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications. EMS then forwarded to PEPCO an invoice by-the United States Mail for the repair in the amount of Five Hundred Twenty-Nine Dollars ($529.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS' false certification that the motor had been correctly repaired and tested, to its specifications, on or about November

2, 1994 PEPCO paid the invoice in the amount of $529.00.

82. For example, on or about January 17, 1996, EMS secured a contract with PEPCO to repair a 75 hp, Toshiba electric motor from PEPCO's Dickerson facility and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications. EMS then forwarded to PEPCO an invoice by-the United States Mail for the repair in the amount of One Thousand Five Hundred Forty-Seven Dollars ($1,547.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS' false certification that the motor had been correctly repaired and tested, to its specifications, on or about March 18, 1996 PEPCO paid the invoice in the amount of $1,547.00.

83. For example, on or about June 30, 1995, EMS secured a contract with PEPCO to repair a 30 hp, GE electric motor from PEPCO's Production Service Center and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications. EMS then forwarded to PEPCO an invoice by-the United States Mail for the repair in the amount of Five Hundred Sixty-Eight Dollars ($568.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying

on EMS' false certification that the motor had been correctly repaired and tested, to its specifications, on or about August 12, 1995 PEPCO paid the invoice in the amount of $568.00.

84. For example, on or about January 5, 1995, EMS secured a contract with PEPCO to repair a 200 hp, GE electric motor from PEPCO's Production Service Center and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications. EMS then forwarded to PEPCO an invoice by-the United States Mail for the repair in the amount of One Thousand Six Hundred Twenty-Four Dollars ($1,624.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS' false certification that the motor had been correctly repaired and tested, to its specifications, on or about January 25, 1995 PEPCO paid the invoice in the amount of Two Thousand Eight Hundred Twenty-Five Dollars ($2,825.00).

85. For example, on or about September 25, 1995, EMS secured a contract with PEPCO to repair a 40 hp, Realand electric motor from PEPCO's Potomac River facility and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications. EMS then forwarded to PEPCO an invoice by-the United States Mail for the repair in the amount of One Thousand Eight Hundred Seventy-

Seven Dollars and Eighty-Three Cents ($1,877.63) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS' false certification that the motor had been correctly repaired and tested, to its specifications, on or about October 21, 1995 PEPCO paid the invoice in the amount of $1,877.63.

86. For example, on or about June 30, 1995, EMS secured a contract with PEPCO to repair a 25 hp, GE electric motor from PEPCO's Production Service Center and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications. EMS then forwarded to PEPCO an invoice by-the United States Mail for the repair in the amount of Six Hundred Fifty-Eight Dollars ($658.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS' false certification that the motor had been correctly repaired and tested, to its specifications, on or about July 26, 1995 PEPCO paid the invoice in the amount of $658.00.

87. For example, on or about July 27, 1995, EMS secured a contract with PEPCO to repair a 125 hp, Marathon electric motor from PEPCO's Production Service Center and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications. EMS then forwarded to PEPCO an

invoice by-the United States Mail for the repair in the amount of One Thousand Four Hundred Twenty Dollars ($1,420.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS' false certification that the motor had been correctly repaired and tested, to its specifications, on or about September 21, 1995 PEPCO paid the invoice in the amount of $1,420.00.

88. For example, on or about June 1, 1995, EMS secured a contract with PEPCO to repair a 2 hp, GE electric motor from PEPCO's Production Service Center and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications. EMS then forwarded to PEPCO an invoice by-the United States Mail for the repair in the amount of Three Hundred Seventy Dollars ($370.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS' false certification that the motor had been correctly repaired and tested, to its specifications, on or about July 3, 1995 PEPCO paid the invoice in the amount of $370.00.

89. For example, on or about February 3, 1995, EMS secured a contract with PEPCO to repair a 10 hp, U.S. electric motor from PEPCO's Production Service Center and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement

materials or parts as required by the PEPCO Specifications. EMS then forwarded to PEPCO an invoice by-the United States Mail for the repair in the amount of Four Hundred Sixty-Four Dollars ($464.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS' false certification that the motor had been correctly repaired and tested, to its specifications, on or about March 15, 1995 PEPCO paid the invoice in the amount of $464.00.

90. For example, on or about February 24, 1995, EMS secured a contract with PEPCO to repair a 10 hp, Louis Allis electric motor from PEPCO's Morgantown facility and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications. EMS then forwarded to PEPCO an invoice by-the United States Mail for the repair in the amount of Four Hundred Twenty-Eight Dollars ($428.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS' false certification that the motor had been correctly repaired and tested, to its specifications, on or about April 8, 1995 PEPCO paid the invoice in the amount of $428.00.

91. For example, on or about July 14, 1995, EMS secured a contract with PEPCO to repair a 15 hp, Westinghouse electric motor from PEPCO's Production Service Center and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed

to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications. EMS then forwarded to PEPCO an invoice by-the United States Mail for the repair in the amount of Four Hundred Ninety-Two Dollars ($492.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS' false certification that the motor had been correctly repaired and tested, to its specifications, on or about August 18, 1995 PEPCO paid the invoice in the amount of $492.00.

92. For example, on or about August 16, 1995, EMS secured a contract with PEPCO to repair a 50 hp, Baldor electric motor from PEPCO's Production Service Center and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications. EMS then forwarded to PEPCO an invoice by-the United States Mail for the repair in the amount of One Thousand One Hundred Seventy-Four Dollars ($1,174.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS' false certification that the motor had been correctly repaired and tested, to its specifications, on or about September 18, 1995 PEPCO paid the invoice in the amount of $1,174.00.

93. For example, on or about August 25, 1995, EMS secured a contract with PEPCO to repair a 100 hp, EM electric motor from PEPCO"s Production Service Center and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO

Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications. EMS then forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of One Thousand Four Hundred Fifty-Six Dollars ($1,.456,00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS' false certification that the motor had been correctly repaired and tested, to its specifications, on or about October 5, 1995 PEPCO paid the invoice in the amount of $1,456.00.

94. For example, on or about April 6, 1995, EMS secured a contract with PEPCO to repair a 300 hp, EM electric motor from PEPCO's Production Service Center and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications. EMS then forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Four Thousand One Hundred Fifty Dollars (4,150.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS' false certification that the motor had been correctly repaired and tested, to its specifications, on or about May 17, 1995 PEPCO paid the invoice in the amount of $4,150.00.

95. For example, on or about October 26, 1994, EMS secured a contract with PEPCO to repair a 200 hp, Colt electric motor from PEPCO"s Production

Service Center and Certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications. EMS then forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of One Thousand Seven Hundred Six dollars ($1,706.00) and falsely certified to PEPCO that the requested repairs had been performed and the required repairs had truly been done. Relying on EMS false certification that the motor had been correctly repaired and tested, to its specifications, on or about November 14, 1994 PEPCO paid the invoice in the amount of $1,706,00.

96. For example, on or about July 10, 1995, EMS secured a contract with PEPCO to repair a 1 hp, Reliance electric motor from PEPCO"s Production Service Center at Forestville, Maryland and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications. EMS then forwarded to PEPCO an invoice by the United States Mail for the repair in the amount: of Four Hundred Eighty Seven Dollars ($487.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS' false certification that the motor had been correctly repaired and tested, to its specifications, on or about July 14, 1995 PEPCO paid the invoice in the amount of $487.00.

97. For example, on or about August 3, 1995, EMS secured a contract with PEPCO to repair a 3 hp, GE electric motor from PEPCO's Production Service Center and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications, EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications. EMS then forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Three Hundred Eighty-Seven Dollars ($387.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS' false certification that the motor had been correctly repaired and tested, to its specifications, on or about August 23, 1995 PEPCO paid the invoice in the amount of $387.00.

98. For example, on or about March 29, 1995, EMS secured a contract with PEPCO to repair a 0.75 hp, Doerr Electric electric motor from PEPCO"s Production Service Center and certified to PEPCO that all repairs would be accomplished in accordance with PEPCO Motor Repair Specifications. EMS subsequently serviced the motor but deliberately and willfully failed to provide the repairs, testing and/or replacement materials or parts as required by the PEPCO Specifications. EMS then forwarded to PEPCO an invoice by the United States Mail for the repair in the amount of Two Hundred Eighteen Dollars ($218.00) and falsely certified to PEPCO that the requested repairs had been performed and the required testing had truly been done. Relying on EMS' false

certification that the motor had been correctly repaired and tested, to its specifications, on or about April 6, 1995 PEPCO paid the invoice in the amount of $218.00.

99. The same schemes as were utilized by the Defendants against PEPCO were likewise utilized by the Defendants against other utilities, mines, and other industrial customers of EMS. Specifically, EMS and the individual Defendants committed virtually the identical wrongs on Allegheny Electric Power Company, Inc., Pennsylvania Electric Power Company, Long Island lighting and Power Company, Conrail, Central Hudson Electric Power Company, Pennsylvania Electric Corporation, Willamette Paper Corp., and numerous others.

100. The aforesaid scheme to inadequately repair motors, fraudulently repair motors, and otherwise collect monies from PEPCO for repairs that were either not done or inappropriately done, resulted in PEPCO placing back into service motors which had been inadequately repaired. As a result, those motors enjoyed a lesser useful life than was expected and failed more frequently and sooner than would have ordinarily been expected.

101. The aforesaid actions by EMS constituted mail fraud in violation of 18 U.S.C. § 1341, wire fraud in violation of 18 U.S.C. § 1343 and conspiracy in violation of 18 U.S.C. § 371.

Count I
(Violations of 18 U.S.C. § 1962(a)

102. PEPCO restates and incorporates paragraphs 1 through 101, as if fully set forth herein.

103. Paragraphs 1 through 101, above, constitute and describe Defendants' schemes and artifices to defraud and obtain money and property by means of false and fraudulent pretenses, representations and promises.

104. Beginning in at least 1988, and continuing to 1996 in furtherance of and for the purpose of executing the described schemes and artifices to defraud and to obtain money by means of false pretences, Defendants, on numerous occasions used and caused to be used mail depositories of the United States Postal Service by both placing and causing to be placed letters and other mailable matter in the depositories, and by removing and causing to be removed letters and other mailable matter from the depositories. Each such use of the mails in connection with the described schemes and artifices to defraud and to obtain money by means of false pretenses constitutes a separate and distinct violation of 18 U.S.C. § 1341.

105. Beginning in at least 1988, and continuing to 1996 in furtherance of and for the purpose of executing the described schemes and artifices to defraud and to obtain money by means of false pretences, Defendants, on numerous occasions used and caused to be used wire communications in interstate and foreign commerce, by both making and causing to be made wire communications. Each such use of a wire communication in connection with the

described schemes and artifices to defraud and to obtain money by means of false pretenses constitutes a separate and distinct violation of 18 U.SC. § 1343.

106. From at least 1988 and continuing to 1996 and elsewhere, Defendants repeatedly engaged in acts indictable under 18 U.S.C. § 1341 (relating to mail fraud) and 18 U.S.C. § 1343 (relating to wire fraud), used the United States mails as well as wire and other communications in interstate commerce in connection with these acts and thereby continually engaged in "racketeering activity" within the meaning of 18 U.S.C. § 1961(l)(B) in the course of the described criminal schemes.

107. Each Defendant is a "person" defined in 18 U.S.C. § 1961(3).

108. EMS constitutes an enterprise under 18 U.S.C. § 1961(4) (hereinafter, the "EMS Enterprise).

109. The EMS Enterprise is engaged in, and its activities affect, interstate commerce.

110. The Defendants' repeated violations of 18 U.S.C. § 1341 and 1343 extend over a period of years and involved distinct and independent criminal acts. They were. neither isolated nor sporadic events, but involved the regular and repeated violation of law to accomplish the Defendants' desired ends in the course of the continuing business of the EMS Enterprise. These acts were related to each other by virtue of (a) common participants, (b) common victims, (c) common methods of commission through bribes and sham repair work, and (d) the common purpose and common result of swindling and bilking PEPCO and PEPCO's customers and enriching Defendants at PEPCO's and PEPCO's customers' expense while

concealing Defendants' criminal activities. As such, this conduct constitutes a pattern of racketeering activity within the meaning of 18 U.S.C. § 1961(5).

111. The aforementioned pattern of racketeering activity produced income for Defendants, principally through the payment of repair invoices by PEPCO and other defrauded EMS customers, all or a part of which income was used to establish and operate the EMS Enterprise, in violation of 18 U.S.C. § 1962(a).

112. Defendants' violation of 18 U.S.C. § 1962(a) caused PEPCO to suffer direct injury to its business and property through more than One Million Dollars ($1,000,000.00) in payments for repair work either not performed at all or improperly performed, plus other damages and losses described above.

Count II
(Violation of 18 U.S.C § 1962(d)

113. PEPCO restates and incorporates paragraphs 1 through 112 as if fully set forth herein.

114. Paragraphs 1 through 101 above constitute and describe Defendants schemes and artifices to obtain the property by means of false and fraudulent pretences, representations and promises. The scheme and artifice described in paragraphs 1 through 101 above was arrived by the agreement of the individual Defendants, with and on behalf of the corporate defendant, herein who did agree and conspire among themselves to implement the aforesaid scheme and artifice.

115. The aforesaid conspiracy to commit mail fraud in violation of 18 U.S.C. § 1341 and wire fraud in violation of 18 U.S.C. § 1343 is itself a violation of 18 U.S.C. 371 and thereby the Defendants who were

continually engaged in "racketeering activity" within the meaning of 18 U.S.C. § 1961(1)(b) in the course of the above-described criminal schemes.

116. Each Defendant is a "person" as defined in 18 U.S.C. § 1961(3).

117. EMS constitutes an enterprise under 18 U.S.C. § 1961(4).

118. The EMS enterprise is engaged in, and its activities affect, interstate commerce.

119. The Defendants repeated violations of 18 U.S.C. § 1341, 1343 and 371 extended over a period of years and involve distinct and predicate acts.

Prayer for Relief

Wherefore, Plaintiff, Potomac Electric Power Company respectfully requests judgment against Defendants awarding them:

(a) For Defendants' violations of the Racketeer Influenced and Corrupt Organizations Act, treble damages against all Defendants, jointly and severally, in an amount to be proven at trial, together with prejudgment interest, costs and attorney's fees; and

(b) Such other and further relief as this Court deems necessary and just.

\s\ _____

James P. Gillece, Jr. #00175
LaShanda D. Branch #024804
McGuire, Woods, Battle
& Boothe LLP
Baltimore, Maryland 21201
(410) 659-4421
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Entered January 20, 1999]

POTOMAC ELECTRIC POWER COMPANY, *
Plaintiff, *
*
v. *
*
ELECTRIC MOTOR SUPPLY, INC., et al., *
Defendants. *

Civil Action No. S-98-2519

MOTION TO DISMISS COUNTS I AND 2 OF POTOMAC ELECTRIC POWER COMPANY'S COMPLAINT

Pursuant to Fed. Rule 12(b)(6), Defendants, Electric Motor and Supply, Inc., Ralph Force, Charles M. Rhodes and Darryl Price, by their undersigned attorneys, move to dismiss Counts I and 2 of the Potomac Electric Power Company's Complaint for failure to state claims upon which relief can be granted. The grounds for this motion appear in detail in the accompanying memorandum of law.

Respectfully submitted,

Date: 1/20/99 /s/_____

James P. Ulwick
Kramon & Graham, P.A.
One South Street, Suite 2600
Baltimore, Maryland 21202-3201
(410) 752-6030
Attorneys for Defendant Rhodes

/s/_____

Paul F. Kemp, Esquire
Catterton, Kemp & Greenberg, P.A.
Suite 215
200 A Monroe Street
Rockville, Maryland 20850
(301) 294 -0460
Attorneys for
Electric Motor and Supply, Inc.

/s/_____

Bruce L. Marcus, Esquire
Marcus & Bonsib
Suite 116
6411 Ivy Lane
Greenbelt, Maryland 20770-1405
(301) 441 -3000
Attorneys for Defendant Force

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of January, 1999, copies of the foregoing Motion to Dismiss Counts 1 and 2 of the Complaint, accompanying Memorandum of Law and proposed Order were hand-delivered to:

James P. Gillece, Jr., Esquire
LaShanda D. Branch, Esquire
Fiona Ong, Esquire
McGuire, Woods, Battle & Boothe LLP
1300 The Blaustein Building
One North Charles Street
Baltimore, Maryland 21202

/s/ _____
James P. Ulwick

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Civil Action No. S-98-2519

[Entered: January 20, 1999]

POTOMAC ELECTRIC POWER COMPANY *
Plaintiff, *
v. *
*
ELECTRIC MOTOR SUPPLY, Inc., et. al., *
Defendants. *

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS COUNTS 1 AND 2 OF COMPLAINT

Defendants, Electric Motor and Supply, Inc., ("EMS"), Ralph Force, Charles M. Rhodes and Darryl Price., by their undersigned attorneys, move to dismiss Counts 1 and 2 of the Potomac Electric Power Company's ("PEPCO") complaints pursuant to Fed. R. Civ. P 12(b) (6), for failure to state claims upon which relief can be granted.

For the reasons steed below, the Court should grant the Motion.

I. THE APPLICABLE LEGAL STANDARDS

A motion to dismiss under Fed. R. Civ P. 12(b)6 should be where it appears beyond a doubt that a plaintiff can prove no set of facts in support of his claim which would entitle him to relief. See Conley v. Gibson, 78 S.Ct. 99, 102 (1957). In determining whether

to dismiss a complaint, a court must view the well-pleaded material allegations in a light most favorable to the plaintiff, with the alleged facts accepted as true. A court, however, "is not bound to accept conclusory allegations concerning the legal effect of the acts and omissions the plaintiff has set out if these allegations do not reasonably follow from his description of what happened." FDIC v. Williams, 599 F. Supp. 1184, 1199 (D. Md. 1984). "Were it otherwise, Rule 12(b)(6) would serve no function for its purpose is to provide a defendant with a mechanism for testing the legal sufficiency of the complaint." United Mine Workers of Am. v. Wellmore Coal Corp., 609 F.2d 1083, 1085-86 (4th Cir. 1979).

A complaint that fails to allege an essential element of a claim is subject to dismissal. Menasco Inc. v. Wasserman, 886 F.2d 681, 862, 684-685 (4th Cir. 1989).

II. SUMMARY OF PLEADED ALLEGATIONS

Potomac Electric Power Comp filed this Complaint in the United States District Court for the District of Maryland against Electric Motor and Supply Inc., Ralph Force, the Chief Executive Officer and majority owner of shares of stock in EMS, Michael Rhodes, an employee and engineer, and Darryl Price, a former employee of EMS who was responsible for production and customer services. PEPCO states that as a part of its procurement process, it employed a system wherein competitive bids were allegedly solicited in writing or on the telephone in an effort to aid in its selection of an electric motor repair shop.

After reviewing the bids, PEPCO claimed it selected a vendor to service its electric motors based on price and quality.[1]

From 1985 until 1996 PEPCO submitted hundreds of electric motors to EMS for repair. After EMS repaired PEPCO's electric motors, it allegedly mailed PEPCO invoices for the repairs together with various types of documentation relating to the work performed by EMS. Upon receipt of the repaired electric motors, PEPCO alleges that it forwarded payment to EMS via the U.S. Mail. In reference to the repairs performed by EMS, PEPCO makes the following charges: (1) EMS failed to perform certain motor repair work but still billed for it; (2) the motor repair work performed was faulty and not performed to specifications; (3) EMS falsified motor repair records to conceal work not performed or not performed according to the required PEPCO specifications, and (4) that EMS engaged in a pattern of lies and deceit to cover up their alleged illegal conduct. The Complaint further states that upon receipt of the payments, the Defendants then invested the income generated from the alleged illegal operations back into the enterprise for use in the furtherance of the pattern of activity described hereinabove. PEPCO alleges in conclusory

---

[1] Notably absent from the allegations contained in the Complaint was the obvious fact that all of the electric motors were identified by employees of PEPCO as having been defective or unserviceable prior to the electric motors having been sent to defendant EMS for repairs. This fact, coupled with the absence of any allegation that the electric motors failed to function after having been repaired by EMS, leaves the Court with the inescapable conclusion that the motors were not serviceable prior to EMS being sought out, and the motors were in fact placed back into service without Plaintiff making any claim of defective or ineffective repairs having been done by EMS.

fashion that Defendants engaged in racketeering activity through their- conspiracy to commit mail fraud in violation of 18 U.S.C. § 1341 and by wire fraud in violation of 18 U.S.C. § 1343.

III. PEPCO'S RICO CLAIMS SUFFER FROM PLEADING DEFECTS THAT MANDATE DISMISSAL

Apparently on the theory that no contract dispute is complete without a threat of crippling punitive liabilities, PEPCO's Complaint purports to state a claim for treble damages and attorneys' fees under the federal RICO statute. The Complaint represents a textbook example of how litigants have abused RICO and of why courts have not hesitated to summarily dispose of concocted claims of "racketeering," in contexts which are otherwise relatively simple, straightforward alleged breaches of contract, such as the one that PEPCO has set forth.

Although principally intended to afford a civil remedy for victims of organized crime and similar criminal enterprises, RICO, to the dismay of many courts, has come to appear all too frequently in garden-variety tort and contract cases, such as the case at Bar. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499-500 (1985) (acknowledging concern about RICO's use against legitimate businesses, and not merely its primary targets - - "mobsters and organized criminals"). The reason for the frequent misuse of the RICO site is that it permits a prevailing party to recover three tines its actual damages, thereby making it a powerful and tempting tool for those who desire to '"ratchet up" the threat inherent in ordinary breach of contract or fraud claims.

Under RICO, a plaintiff can succeed in stating a claim only by alleging a "pattern", of '"racketeering activity" consisting of "predicate acts " that violate one or more federal criminal statutes. Those statutes include the federal mail and wire fraud acts, which PEPCO accuses EMS of violating. Complaint, ¶ 106 (alleging that the Defendants carried out an unlawful "scheme" through "the use of the interstate mails and wires, " in violation of "18 U.S.C. §1341 and 18 U.S.C. § 1343").

A. PLAINTIFFS FAIL TO STATE A CLAIM UNDER 18 U.S.C. §1962(a)

Section 1962(a) of Title 18, United States Code, makes it unlawful for a person who has received income from a "Pattern of racketeering activity' to "use or invest" such income in an enterprise engaged in or affecting interstate or foreign commerce. "Thus subsection (a) does not make it criminal to engage in a pattern of racketeering activity, but only penalizes the use of the income therefrom." De Muro v. E.F. Hutton, 643 F. Supp. 63, 66 (S.D.N.Y. 1986). Section 1964(c) states that any person injured in his business or property by reason of a violation of § 1962 of this chapter may sue therefore in federal court and recover threefold the damages he sustains. Accordingly, the plain language of sections 1964(c) and 1962(a) requires plaintiffs seeking to recover civil damages due to 1962(a) violations to establish that the use or investment of income and not racketeering alone caused the injury. Nugget Hydroelectric L.P. v. Pacific Gas and Electric Co., 981 F.2D 429, 436 (9th Cir. 1992). "In short to make out a claim under § 1962(a) as incorporated by § 1964(c), ... a plaintiff must allege and

prove an injury arising from use or investment of racketeering income." Danielsen v. Burnside-Ott Aviation Training Center, Inc., 941 F.2d 1220, 1230 (D.C. Cir. 1991). In Danielsen, the Circuit Court further explained that "[if] it were true under any theory that a predicate act injury would be sufficient to provide standing to a claim under § 1962(a), then it would be difficult to understand why Congress enacted § 1962(a). In other words, if allegations sufficient to base a § 1962(c) action meet all of the requirements of § 1962(a) allegation, then why did Congress pass both?" Id.

The plain language of the Complaint shows that the only damages PEPCO seeks to recover are those caused by the alleged predicate acts. Plaintiff completely fails to allege any injury which was caused by any alleged "use or investment" of alleged. racketeering income. Moreover, Plaintiffs conclusory allegations that EMS used or invested income received from PEPCO mm insufficient as a matter of law, absent some explanation or allegation on how that use or investment specifically injured Plaintiff. The Complaint merely contains descriptions of alleged predicate acts, but not descriptions of how the use or investment of the income supposedly injured Plaintiff. For example, PEPCO's Complaint contains the following allegations:

(a) "From at least 1988 and continuing to 1996 and elsewhere, Defendants repeatedly engaged in acts indictable under 18 U.S.C. § 1341 (relating to mail fraud) and 18 U.S.C. § 1343 (relating to wire fraud), used the United States mails as well as wire and other communications in interstate commerce in connections with these acts and thereby continually engaged in 'racketeering activity' within the meaning of 18 U.S.C. § 1961(1)(b) in the course of the described criminal schemes." PEPCO Complaint ¶ 106

(b) "The aforementioned pattern of racketeering act produced income for Defendants, principally through the payment of repair invoices by PEPCO and other defrauded EMS customers, all or part of which income was used to establish and operate the EMS Enterprise, in violation § 1962(a)." PEPCO Complaint ¶ 111.

(c) "Defendants' violations of 18 U.S.C. § 1962(a) caused PEPCO to suffer direct injury to its business and property through more than One Million dollars ($ 1,000,000,00) in payments for repair work either not performed at all or improperly performed..."' PEPCO Complaint ¶112.

These allegations fail to establish an actionable claim under §1962(a) because they provide no explanation of how the "use or investment" of the income injured Plaintiff. The Complaint simply explains that MAIN alleged injuries arise from the alleged underlying predicate acts and pattern of racketeering.

Defendants recognize that the Fourth Circuit has previously ruled on this precise issue in Busby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990). Defendant respectfully submits, however, that given the opportunity to revisit its ruling, the Fourth Circuit will conform its view to that previously announced in other Circuits. The Busby decision has continuously been rejected an criticized. Every Circuit that has addressed that issue, with the notable exception of the Fourth Circuit, has found that §1964(c) requires that nay injury alleged under § 1962(a) must flow from the use or investment of racketeering income, rather than from predicate acts. See, e.g. Quaknine v. MacFarlane, 897 F.2d 75 (2nd Cir. 1990); Glessner v. Kenny, 952 F.2d 702 (3d Cir, 1991); Parker and Parsley

Petroleum Company v. Dresser Industries, 972 F.2d 580 (5th Cir. 1992); Craighead v. E.F. Hutton & Company, 899 F.2d 485 (6th Cir. 1990); Nugget Hydroelectric v. Pacific Gas and Electric Co., 981 .2d 429 (9th Cir. 1992), cert. denied, 113 S. Ct. 2336 (1993) Grider v. Texas Oil & Gas Corp., 868 F.2d 1147 (10th Cir. 1989); Danielsen v. Burnside-Ott Aviation Training Center, Inc., 941 F.2d 1220 (D.C. Cir. 1991).[2]

The mere reinvestment of income allegedly derived from the fraudulent acts also is not sufficient to establish a 1962(a) violation. Plaintiff must do more than demonstrate that EMS invested or used the income flowing form its alleged racketeering activities to sustain the enterprise and further, that continued operation of the enterprise harmed plaintiff. See Turner v. Union Planters Bank of S. Miss., 974 F. Supp. 890, 893, (S.D.Miss. 1997) "[T]he use or investment of racketeering income [which] keeps the defendant alive so that it may continue to injure plaintiff is insufficient to meet the injury requirement of § 1962(a)" Jiffy Lube International v. Jiffy Lube of Pa., 848 F. Supp. 569, 582 citing Lightning Lube Inc. v. Witco Corp., 5 F.3d 1153, 1188 (3rd Cir. 1993). See, e.g., Turner, citing Glessner v. Kenny, 952 F.2d 702, 709 (3rd Cir. 1991) ("defendant had 'derived income from the fraudulent sale of units, and that racketeering profits were reinvested in the business' which in turn enabled further fraudulent sales, did not meet the investment injury requirement.") In fact the Third Circuit explained:

---

[2] Chief Judge Motz recently questioned the soundness of the Busby decision, although he stated that he was bound to follow it. See, In re American Honda Motor Co., Inc. Dealerships Relations Litigation, 941 F. Supp. 528, 548 (1996).

> Over the long term, corporations generally reinvest their profits, regardless of the source. Consequently, almost every racketeering act by a corporation will have some connection to the proceeds of a previous act. ... If plaintiffs' reinvestment injury concept were accepted, almost every pattern of racketeering activity by a corporation would actionable under § 1692(a) ...

Brittingham v. Mobil Corp., 943 F.2d 297, 305 (3d Cir. 1991).

Accordingly, because PEPCO has failed to allege any facts demonstrating injury allegedly sustained by it from the use or investment of racketeering income, no cause of action under 1962(a) has been stated, and the claim should, therefore, be dismissed. In the alternative, if the Court believes that it is bound to follow Busby, despite the highly questionable soundness of the validity of that decision, Defendants respectfully request that, because the investment injury rule has been susceptible to varying interpretations and opinions resulting in significant division in the various Courts of Appeal, a 28 U.S.C. § 1292(b) appeal order be issued to permit the Fourth Circuit to review its decision in Busby.

B. THERE CAN BE NO RICO CONSPIRACY WITHOUT A SUBSTANTIVE RICO VIOLATION.

18 U.S.C. § 1962(d) provides that, "it shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this subsection." Plaintiffs must therefore properly allege a violation of 1962 (a), (b) or (c) to withstand a 12(b)(6) challenge. See, e.g., Stewart v. Associates Consumer Discount Co., 1 F. Supp 2d 469, E.D. Pa. 1998) citing Jiffy Lube International v. Jiffy Lube of Pa., 848 F. Supp. 5960, 583 (E.D. Pa. 1994) citing Lighting Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1191 (3d Cir. 1993) ("[a]ny claim under § 1962(d) based on a conspiracy to violate the other subsections of section § 1962 necessarily must fail if the substantive claims are themselves deficient."). Plaintiff has not sufficiently alleged a § 1962(a) violation. Accordingly, Count II alleging conspiracy to commit a violation of § 1962(a), cannot withstand a Rule 12b(6) challenge and therefore fails as a matter of law.

C. PLAINTIFFS CLAIMS MUST BE DISMISSED AS THEY ARE NOT PLED WITH SUFFICIENT PARTICULARITY.

PEPCO's RICO claims must be dismissed because their allegations do not comport with the pleading requirements of Federal Rule of Civil Procedure 9(b). "Federal Rule of Civil Procedure 9(b) requires a pleader of fraud to detail with particularity, the time, place and manner of each act of fraud plus the role of each defendant in the scheme." Lancaster Community Hosp. v. Antelope Valle Hosp. Dist., 940 F.2d 397. 405 (9th Cir. 1991) cert. denied, 502 U.S. 1094 (1992).

Because RICO claims frequently involve these sorts of blunderbuss allegations of fraud, federal courts require plaintiffs to plead RICO claims with particularity. Mylan Laboratories, Inc. v. Akzo, N.V., 770 F. Supp. 1053, 1074 (D. Md. 1991) ("a RICO claim alleging fraud as its underlying predicate act must do so with particularity or else be dismissed") see also Vicom, Inc. v. Harbridge Merchant Servs. Inc., 20 F.3d 771, 771 (7th Cir. 1994); Brooks v. Bank of Boulder, 891 F. Supp. 1469, 1476 (D. Colo. 1994). Hence, PEPCO may pursue a RICO claim only if the Court concludes that it has meet the exacting standard of particularity. PEPCO has fallen far short of this standard.

The requirement of particularity entails alleging the specific time, place, and content of each allegedly fraudulent statement, as well as the identity of the specific persons involved in making those statements. See. e.g., Riley v. Murdock, 828 F. Supp. 1215, 1225 (E.D.N.C. 1993); Metro Furniture Rental, Inc. v. Alessi, 770 F. Supp. 198, 201 (S.D.N.Y. 1991); see also Abmraziunas v. Bank of Boulder, 846 F. Supp. at 1463 (quoting Saine v. A.I.A., Inc., 582 F. Supp. 1299, 1302 (D. Colo. 1984)) (a RICO plaintiff must identify the particular defendants with whom the plaintiff dealt, designate the occasions on which fraudulent statements were made and by whom they were made, and specify the occasions on which fraudulent statements were made and how).

In addition, where, as in this case, Plaintiff had based its RICO claim on allegations of fraud, Plaintiff must allege the actual number of alleged telephone calls, allegations of wire fraud, the precise dates on which those telephone calls occurred, the alleged

content of the fraudulent communications, and how each alleged fraudulent communication furthered the alleged scheme. Qantel Corp. v. Niemuller, 771 F. Supp. 1361, 1369 (S.D.N.Y. 1991); see also Anthony Distributors, Inc. v. Miller Brewing Co., 882 F. Supp. 1024, 1035 (M.D. Fla. 1995) (to meet the requirements of particularity, a RICO claim must state more than just the general time frame in which the allegedly fraudulent communications occurred - - it must also state the specific month and the specific day on which each specific defendant made allegedly fraudulently statements).

The requirement of particularity also entails alleging factual circumstances given rise to a strong inference that the RICO defendant has the requisite fraudulent intent or scienter. Zaro Licensing, Inc. v. Cinmar, Inc., 779 F. Supp. 276, 285 (S.D.N.Y. 1991). Furthermore, where, as in this case, the alleged scheme involves multiple defendants, Plaintiff cannot simply lump or join the Defendants together as a single entity, but rather must specifically inform each Defendant of his, or her, or its role in the scheme. See e.g., Iepson Inc. v. Makita Corp., 34 F.3d 1321, 1328 (7th Cir. 1994); Viacom, Inc. v. Harbridge Merchant Servs., Inc., 20 F.3d at 778.

In other words, to state a RICO claim, Plaintiff must specifically allege which Defendant made a particular lie or misrepresentation and under what circumstances. Brooks v. Bank of Boulder, 891 F. Supp. at 1476. If a plaintiff fails to set forth the specific times and places of each allegedly fraudulent communication, then the plaintiff fails to state a claim under RICO. Butula v. Agashiwala, 916 F. Supp. 314, 321 (S.D.N.Y. 1996).

PEPCO's Complaint plainly fails all of these tests. It does not specify or refer to a single fraudulent statement made by any specific time. It does not describe the content of even one of the allegedly fraudulent communications. It does not undertake to explain how, if at all, any of the undisclosed fraudulent statements furthered the allegedly fraudulent scheme. It does not provide any indication of any of the circumstances which suggest that any particular defendant made any of the allegedly undisclosed fraudulent statements with the requisite intent to defraud. The Complaint fails to allege with sufficient particularity that EMS ever acted with the intent to deceive or defraud PEPCO. While the Complaint does contain conclusory allegations that the Defendants committed wire and mail fraud, Plaintiff fails to provide specific examples of the communications which describe the alleged deception. Finally, it does not even begin to explain when any of the specific Defendants employed the mails, as opposed to telephonic communications or some other method, in order to affect the undisclosed fraudulent-statements.

Plaintiff repeatedly lumps the individual Defendants together by referring to them collectively as "defendants." Courts have consistently frowned upon this practice. See Kerby v. Mortgage Funding Corp., 992 F. Supp. 787 (D.Md. 1998) ("A complaint that generally alleges a fraudulent scheme without clearly specifying which defendant played which fails to comport with the rule."); See also Comwest, Inc. v. American Operator Servs., Inc., 765 F. Supp. 1467, 1471 (C.D. Cal. 1991) ("It is not enough for plaintiffs to make group allegations in such a situation because collective responsibility a not self evident. Each

defendant is entitled to know what misrepresentations are attributed to them and what fraudulent conduct they are charged with.")

The Complaint, in short, is a model of how not to plead a RICO claim with particularity. It fails to state a claim upon which relief can be granted.

D. THE COMPLAINT SETS FORTH NO FACTUAL ALLEGATIONS DEMONSTRATING ANY AGREEMENT AMONG THE DEFENDANTS

The Complaint alleges that EMS and the other named defendants conspired together in violation of 18 U.S.C. § 1962(d). This section provides that, "it shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b) or (c) of this subsection." To demonstrate a RICO conspiracy, "there must be proof that the individual by his words or actions objectively manifested an agreement to participate, directly or indirectly, in the affairs of the enterprise, through the commission of two or more predicate acts." Baumer v. Pachl, 8 F.3d 1341, 1346 (9th Cir. 1993) citing United States v. Bright, 630 F.2d 804, 834 (5th Cir. 1980). Because the agreement is essential to any RICO civil conspiracy claim, "the complaint at the very least [must] allege such a specific agreement" Hecht v. Commerce Clearing House, Inc., 897 F.3d 21, 35 (2d Cir. 1990). Frymire v. Peat, Marwick, Mitchell & Co., 657 F. Supp. 889, 896 (N.D, Ill. 1987) ("allege with some particularity facts sufficient to show an agreement between the parties to inflict the wrong"). In addition the complaint must allege the particular role of each of the Defendants in the alleged conspiracy.

In this case, Plaintiff s Complaint does not meet these essential requirements PEPCO fails to allege that EMS objectively manifested any agreement to participate in a conspiracy in violation of 1962(d). Plaintiff merely offers general, conclusory allegations that simply mirror the language contained in the RICO statute (stating that, "the scheme and artifice ... was arrived by the agreement of the individual defendants, with and on behalf of the corporate defendant, [ ] who did agree to conspire among themselves to implement the aforesaid scheme and artifice. Complaint, ¶ 114. Plaintiffs do not offer a single fact to support their claims that EMS ever manifested an objective intent to participate in the alleged RICO conspiracy.

E. THE COURT SHOULD DISMISS THE CLAIM OF CONSPIRACY BECAUSE, AS A MATTER OF LAW, THE DEFENDANTS CANNOT CONSPIRE WITH ONE ANOTHER

While in some instances it may be sufficient to set forth the statutory requirements, Plaintiff is also required to set forth specific facts as to each Defendant which support the contention that a conspiracy existed between all of the Defendants with a delineation and explanation of the roles assumed by each therein. Count II alleges that EMS, Ralph Force, Charles M. Rhodes and Darryl Price conspired with one another "to commit mail fraud in violation of 18 U.S.C. § 1341 and wire fraud in violation of 18 U.S.C. § 1343." Complaint, ¶¶ 106, 115. The Court should dismiss this count because, as a matter of law, the concerted actions of a corporation and its agents cannot constitute a conspiracy.

"A civil conspiracy is a combination of two or more persons by an agreement or understanding to accomplish an unlawful act or to use unlawful means to accomplish an act not in itself illegal, with the further requirement that the act or the means employed must result in damages to the plaintiff. Green v. Washington Sub. San. Comm'n, 259 Md. 206, 221 (1970). In this case the conspiracy claim fails because a corporation and its agents constitute a single "person" as defined under the law of conspiracy.

Courts have long recognized that, as a matter of law, a corporation cannot conspire with its own employees or other agents. See, e.g., Kairys v. Douglas Stereo, Inc., 83 Md. 667, 683 (1990) ("[n]o conspiracy can lie between a corporation and its agent acting within the scope of his duties"); Marmott v. Maryland Lumber Co., 807 F.2d 1180, 1184 (4th Cir. 1986), cert. denied, 482 U.S. 929 (1987) (applying Maryland law) ("a conspiracy between a corporation and its agents, acting within the scope of their employment, is a legal impossibility"). As a matter of law, EMS could not conspire with its agents.

In summary, it is a "legal impossibility" for Force, Rhodes or Price to conspire with the corporation that they serve as agents. For these reasons, PEPCO cannot state a claim for civil conspiracy against EMS.

IV. CONCLUSION

Plaintiffs complaint amounts to nothing more than a collection of broad allegations and generalizations with a sprinkle of the language employed by the RICO statute. "A RICO complaint is not a mix and match game in which Plaintiff may artfully invoke magic words to avoid dismissal."

Glessner at 714. Because Counts 1 and 2 of PEPCO's complaint fall short of the required standard, the Court should dismiss them. In the alternative, if this Court feels compelled to follow Busby's mandate, defendant's respectfully request a 28 U.S.C. § 1292(b) appeal.

Respectfully submitted,

\s\ _____
James P. Ulwick
Kramon & Graham, P.A.
One South Street, Suite 2600
Baltimore, Maryland 21202-3201
(410) 752-6030
Attorneys for Defendant
Charles M. Rhodes

\s\ _____
Paul F Kemp, Esquire
Catterton, Kemp & Greenberg, P.A.
Suite 215
200 A Monroe Street
Rockville, Maryland 20850
(301) 294-0460
Attorneys for
Electric Motor & Supply, Inc.

\s\ _____
Bruce L. Marcus, Esquire
Marcus & Bonsib
Suite 11 6
6411 Ivy Lane
Greenbelt, Maryland 20770-1405
(301) 441-3000
Attorneys for Defendant Force

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

POTOMAC ELECTRIC POWER COMPANY	*
	*
Plaintiff	*
	*
v.	*
ELECTRIC MOTOR SUPPLY, INC, et al.	*
	*
Defendants	*

Civil Action S-98-2519

* *

[Entered: February 2, 1999]

RESPONSE TO DEFENDANT'S MOTION TO DISMISS COUNTS I AND II OF COMPLAINT

Plaintiff, Potomac Electric Power Company ("PEPCO"), by it attorneys, James P. Gillece, Jr., Fiona W. Ong and McGuire, Woods, Battle & Boothe LLP, hereby opposes the Motion to Dismiss brought by Defendants Electric Motor and Supply, Inc. ("EMS"), Ralph Force and Charles M. Rhodes (collectively referred to as the OEMS Defendants"),[1]

---

1 While the Motion to Dismiss and Memorandum of Law in Support of the Motion purport to include the participation of Daryl Price, PEPCO. notes that Mr. Price is not represented by any of the attorneys on these pleadings. Mr. Price is represented by James Bacon and neither he nor his attorney have signed the Motion to Dismiss or the Memorandum in Support.

I. INTRODUCTION

This action was brought to recover damage suffered by PEPCO at the hands of the Defendants. For over a decade, the Defendants engaged in a pattern of repeated and fraudulent billing. The Defendants used their position as contractors to derive income. from a pattern of racketeering activity, including fraudulently obtaining hundreds of thousands of dollars from Plaintiff by failing to perform motor repair work yet billing for the same, knowingly performing faulty motor repair work but billing for work not performed to specifications, falsifying motor repair records to hide work not performed or poorly done or not adhering to specifications, and engaging in a pattern of deceit, lies and cover ups to hide their conduct from both PEPCO and the authorities. The Defendants then invested their gains back into their enterprise for its further use in connection with their established pattern of racketeering activity.

PEPCO has brought suit against the Defendants under the Racketeer Influenced and Corrupt Organizations Act ("RICO") . 18 U.S.C. §§1961-68. Specifically, PEPCO: has asserted claims under Section 1962(a) and (d) of RICO, PEPCO's complaint is a highly particularized pleading detailing the fraudulent enterprise, activities and conspiracy engaged in by the Defendants.- This Complaint clearly meets the pleading standards of Federal Rules of Civil Procedures 8(a) and 9(b). In contrast, the EMS Defendants' Motion is premised upon distortion and disregard of the factual allegations of the Complaint as well as misstatements of law and fact, Consequently, their Motion should be denied.

II. STATEMENT OF FACTS

PEPCO is a regulated utility, which provides electrical power to customers in the greater Washington, D.C, metropolitan area. EMS is a company in the business of repairing. electric motors, EMS represented itself to be an expert in the field of electric motor repair, possessing unique knowledge and skills, which were needed by PEPCO. PEPCO reasonably relied on EMS to provide honest and complete information relating to motors submitted by PEPCO, to repair these motors in an effective, efficient and timely manner, and to conduct the appropriate test to verify that the motor had been property repaired, and to provide PEPCO honest bills for the services.

PEPCO described the roles of the individual defendants in the Complaint. The. Chief Executive Officer and owner of EMS is Ralph Force. EMS's engineering manager is Charles Rhodes, and its head of production and customer services was Daryl Price. The individual Defendants were responsible for and involved in the day-to-day business of EMS, and controlled and directed the fraudulent activities that form the basis of this case. All the Defendants agreed and conspired to perpetrate the fraud, not only on PEPCO but also on numerous other businesses.

From 1985 to 1996.. EMS was an authorized vendor to PEPCO and provided repair services on PEPCO motors used in the production of electricity. These motors were sent to, or picked up by EMS, at various PEPCO electric generating stations and other facilities located throughout Washington, D.C., Maryland, and Virginia, and were transported to EMS's location in Altoona, Pennsylvania, for repair.

When PEPCO sent a motor to a vendor (including, but not limited to, EMS) for repair, PEPCO required the following:

1. That certain reports be completed by the vendor upon receipt of the. motor, in part so that PEPCO could obtain the diagnosis of the problem with the motor and the vendor could identify for PEPCO the suggested course of action for repair;

2. That the repair be performed in accordance with detailed specifications provided by PEPCO; and

3. That the vendor conduct certain specific tests upon the motor after the motor had been completed, to ensure that the motor was ready for a return to service.

Each time EMS performed a repair, it would mail to PEPCO an invoice for the amount for the repair as well as documentation as to the repairs which were performed and the tests which were run. PEPCO would then remit payment, also by mail.

During this time PEPCO submitted hundreds of motors to EMS for repair. EMS, however; deliberately did not complete the initial motor inspection reports in accurate manner, and, to the extent that such motor inspection reports were later partially or wholly completed, fraudulently and deceptively completed the motor inspection reports. These reports deliberately did not provide information regarding the cause of the motor's problem or provided false information as to the problem, Through this falsification, EMS was able to fabricate numerous alleged "causes" of the motor's problem, thereby allowing EMS to misrepresent what repairs were performed or not performed, and for which PEPCO was billed and paid. These falsifications also allowed EMS to hide and cover up faulty and

worthless "repairs", falsify test reports and other data which would, in the normal course, indicated to PEPCO that the motor had not been fully and correctly repaired.

Specific examples, as set forth in the Complaint of EMS's failure to provide the required repairs in accordance with PEPCO's specifications but fraudulently billing for the same include: EMS' use of polyester resins instead of the epoxy resins: the failure to do the required two vacuum pressure impregnation treatments ("EVI"); spraying or otherwise painting the motor with an epoxy coating to mask EMS' failure to treatment the motor with epoxy; the use of fraudulent test data including testing accomplished with uncalibrated equipment; the reporting of false test results as a result of test that were either not done at all, or were inaccurately provided; the forwarding of fraudulent of oven temperature charts to misrepresent that the motors had been baked or burned out at the appropriate temperatures; further using fraudulent oven temperature readings to mask the fact that the oven had been utilized at an inappropriate temperature thereby causing damage to PEPCO's motors; with smaller motors, merely removing the ends of the motors and the endbells of the motors, filling the motors with lubricants and cleaning solvents, reattaching the endbells, and painting the motors, all while billing PEPCO for a complete motor repair and restoration.

In its Complaint, PEPCO details 78 specific instances of fraudulent repair by EMS. For each instance, PEPCO described the date of the contract, the motor involved, the certification to PEPCO by EMS that all repairs would be accomplished in accordance with PEPCO's motor repair specifications, the fact that the specifications were not met, EMS's mailing of an

invoice for the specific amount, EMS's false certification that the requested repairs had been performed and the required testing done, PEPCO's reliance on this false certification, and the date and amount of payment all of these instances occurred between 1994 and 1996. PEPCO has already provided documentation supporting these instances of fraud to the Defendants in voluntary and informal discovery.

III. ARGUMENT

A. Legal Standards Governing Motion to Dismiss

The standards applicable to motions to dismiss are well understood and easily articulated. For purposes of a motion to dismiss, the allegations of the complaint and all reasonable inferences to be drawn therefrom are deemed to be true, Conley v. Gibson, 355 U.S. 41 (1957); Washington v. Union Carbine Corp., 870 F2d 957, 962 (4th Cir. 1989). A motion to dismiss may only be granted where a plaintiff had not pled and cannot plead any set of facts upon which relief can be granted. Id. That is not the case here. PEPCO has set forth explicit and detailed facts which support its claims for relief. Accordingly, the EMS Defendants' Motion to Dismiss must be denied.

B. PEPCO Has Properly Pled RICO Claims Against All Defendants.

In their Motion to Dismiss, the EMS Defendants attack PEPCO's claims on the following grounds: (1) that PEPCO has not shown an injury arising from the use or investment of racketeering income; (2) that PEPCO cannot maintain conspiracy

claim because it has not alleged a substantive RICO violation; (3) that PEPCO has not pled its claims with sufficient particularity; (4) that PEPCO has not alleged agreement among the Defendants with respect to its conspiracy claim; and (5) that the Defendants cannot conspire together as a matter of law. These attacks upon PEPCO's complaint, however, fall far short as the EMS Defendants ignore the allegations of the Complaint, the applicable law, and the basic underlying purpose of RICO.

The legislative history of RICO specifically emphasizes the adverse consequences of improper conduct on our democratic processes, domestic security and general welfare including, but not limited to, the economic system. See RICO Statement of Findings and Purposes, Pub. L. No. 91 -452, 84 Stat. 922 (1970), 91st Cong. 2d Sess, reprinted in 1970 U.S. Code Cong. & Adm. News 1073. Thus, the Supreme Court has held:

> RICO is to be read broadly. This is a lesson not only of Congress's self-consciously expansive language and overall approach, but also of its express admonition that RICO is "to be liberally construed to effectuate its remedial purposes."[2] RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime.

---

2 This language is known as RICO's liberal construction clause." See Organized Crime Control Act of 1970, Pub. L, 91-452, §904(a), 84 Stat 947.

Sedirna, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497-98 (1985) (citations omitted) (footnote inserted). Thus, in conformance with the stated legislative intent and Supreme Court holding RICO is not to be read in a formalistic manner, as the EMS Defendants would urge.

PEPCO has asserted claims under §§ 1962(a) and (d). Section 1962(a) of RICO makes It illegal for any person who uses or invests income derived from a pattern of racketeering activity to acquire an interest in or to operate an enterprise engaged in racketeering activity. Section 1962(d) makes it illegal for any person to conspire to violate any of the provisions of §1962(a). Under the legislative intent of RICO and the applicable law, PEPCO has made allegations sufficient to sustain these claims.

1. Under Controlling Fourth Circuit Precedent PEPCO Has Stated A Claim Under Section 1962(a).

The EMS Defendants contend that PEPCO has failed to state a claim under § 1962(a), because PEPCO has not alleged any injury caused by the use or investment of their racketeering income. As the EMS Defendants themselves recognize, however, this is a blatant misstatement of-the applicable law in the Fourth Circuit

It is true that some other jurisdictions have required that plaintiffs plead "a specific injury to the plaintiff caused by the investment of income into the racketeering enterprise, distinct from any injuries caused by the predicate acts of racketeering." See e.g. Vemco, Inc. v. Camardella, 23 F.3d 129, 132 (6th Cir.), cert. denied, 513 U.S. 1017 (1994) (recognized by In re American Honda Motor Co., Inc. Dealerships

Relations Litigation, 941 F. Supp. 528, 548 (D. Md. 1996). This has been termed the Investment use injury requirement, The Fourth Circuit, however has specifically refused to adopt this requirement, and has stated that any injury need not arise hem the use and investment of income, but may arise from the predicate acts of fraud themselves, Busby v. Crown Supply, Inc., 896 F.2d 833, 837-38 (4th Cir. 1990). The income from these acts must then be used or invested in a racketeering enterprise. Id.

The EMS Defendants urge this Court to disregard this binding precedent, based upon their wishful thinking that the Fourth Circuit will eventually revise its position. Thus, the EMS Defendants demonstrate a fundamental misunderstanding of how legal precedent operates. As Chief Judge Motz recognized, and the Defendants should recognize, while one may not agree with the Fourth Circuit's interpretation of § 1962(a), those within the jurisdiction are bound to follow. See In re American Honda, 941 F. Supp. at 548.

The EMS Defendants also seek a 28 U.S.C. § 1292(b) appeal order on this issue, "to permit the Fourth Circuit to review its decision in Busby." See Defendants' Memorandum at p. 9. This is a blatant misuse of 28 U.S.C. § 1292(b), which does not exist for the convenience of parties who simply disagree with the state of the law. Should every party who disagrees with the Fourth Circuit be permitted to challenge each holding through this procedure, the system would collapse under the weight of the challenges. The EMS Defendants should not be permitted to abuse the system in this manner. Their opportunity to challenge Busby will come upon, thy appeal of the judgment ordered in this case.

PEPCO has sufficiently alleged a §1962(a) violation under Busby - - the controlling case law in this jurisdiction. PEPCO has alleged 78 specific predicate fraudulent acts in excruciating detail. See Complaint at ¶21 through 98. As its injury, PEPCO has specifically alleged that because of these instances of fraud, their motors enjoyed a lesser useful life than was expected and failed more frequently and sooner than ordinarily would have been expected. See Complaint at ¶100. PEPCO also specifically alleged that it paid monies to which EMS was not entitled. See eg. Complaint ¶¶ 111, 112. Thus, PEPCO has sufficiently stated a claim for relief under § 1962(a) Busby, as it has alleged injury arising from the Defendants' fraudulent actions.[3]

Even if this court were to disregard Busby and apply the investment use injury requirement, however, PEPCO has still met its burden of allegation. It has clearly alleged injury arising from the Defendants' use and investment of their gains.

As the EMS Defendants correctly recognized, PEPCO alleged that the Defendants received income from PEPCO and other EMS customers as a result of their racketeering activity, and that the income was used to establish and operate e enterprise. Complaint at ¶111. The EMS Defendants ignore numerous other allegations, however. PEPCO also alleged that the Defendants used its same fraudulent schemes against numerous other entities, including Allegheny Electric Power Company, Pennsylvania

---

[3] To the extent that this Court would disregard the Fourth Circuit's controlling decision in Busby, PEPCO seeks leave to amend its Complaint.

Electric Power Company, Long Island Lighting and Power Company, Conrail, Central Hudson Electric Power Company, Pennsylvania Electric Corporation, and Williamette Paper Corporation, among others. Complaint at ¶ 99. PEPCO alleged that the Defendants engaged in mail and wire fraud "in furtherance of and far the purpose of executing the described schemes and artifices to defraud and to obtain money by means of false pretences." Complaint at ¶ 105. PEPCO also alleged that their schemes resulted in "the continuing business of the EMS Enterprise", and that the schemes resulted in "swindling and bilking PEPCO and PEPCO's customers and enriching Defendants at PEPCO's and PEPCO's customers' expense while concealing Defendants' criminal activities," Complaint at ¶ 1 0. PEPCO alleged that the income was invested "back into the criminal enterprise for its further use in connection with their established pattern of racketeering activity." Complaint at ¶ 1. This resulted in various injuries to the business and property of PEPCO, Complaint at ¶ 112,

These allegations certainly meet the requirements under the investment use injury rule. For example, in Newmyer v. Philatelic Leasing, Ltd., 888 F.2d 385, 396 (6th Cir. 1989), the Sixth Circuit, which recognizes the investment use injury rule, found that injury resulting from a continuing enterprise funded by earlier fraud is actionable under § 1962(a). It stated that

> the offering of the particular investment plan in which the plaintiffs put their money may have been financed with the proceeds of pilot "racketeering activity." ... [I]f the defendants used income derived from racketeering activity in 1980 and 1981 to establish and operate the alleged scam in which the plaintiffs put their money in 1982 and 1983, we do not see why it would be impossible for the plaintiffs to show that they had been injured by a violation of 1962(a).

Similarly, as PEPCO alleged, the Defendants received income from their fraudulent activities against PEPCO and other companies, and reinvested the income into their enterprise to continue the pattern of fraudulent activities. This pattern against and income derived from many entities and reinvested into the EMS enterprise caused PEPCO to suffer continued fraudulent billing and failing motors in the course of its business. Such injury did not arise merely from the acts of fraud perpetrated against PEPCO, but also those acts perpetrated against other EMS customers. Thus, PEPCO has alleged an injury arising from the use and investment of the racketeering income, both from itself and from others. As such, it has met the requirements of the investment injury use rule set forth in the cases cited by the EMS Defendants. See eg. Turner v. Union Planters Bank of S. Miss., 974 F. Supp. 890, 893 (S.D. Miss. 1997); Newmyer, 888 F2d at 396 (cited in In re American Honda, 941 F. Supp. at 549-50). With these allegations, and under the liberal construction clause of RICO, PEPCO's 1962(a) claim should not be dismissed.

Furthermore, as PEPCO has alleged a substantive RICO violation under §1962(a), the EMS Defendants, contention that PEPCO's §1962(d) claim must be dismissed for a lack of a § 1962(a) violation is without merit.

2. PEPCO Has Plead Its Claims With Sufficient Particularity to Withstand a Motion to Dismissed.

The EMS Defendants contend that PEPCO's 1962(a) claim, which is based upon their repeated and extensive fraudulent activities, must be dismissed because its allegations do not comport with the pleading requirements of Federal Rule of Civil Procedure 9(b). This rule requires a pleader of fraud to detail each instance of fraud with particularly. The EMS Defendants are correct in noting that federal courts, including those in Maryland, require that RICO claims be pled with particularity. Mylan Laboratories, Inc. v. Akzo, N.V., 770 F. Supp. 1053, 1074 (D. Md. 1991). What the EMS Defendants have ignored, however, is that federal courts, including those in Maryland, have also found that "the particularity requirement of Rule 9(b) does not render the general principles announced in [Federal Rules of Civil Procedure] Rule 8 entirely inapplicable in pleadings alleging fraud: Both rules must be read in conjunction with each other." Id. In contrast to the particularity requirement of Rule 9(b), Rule 8 only requires "a short and plain statement of the claim," ie. notice pleading. Thus Maryland courts have stated that in balancing the policy of Rules 8 and 9(b),

> The most basic consideration in making a judgment as to the sufficiency of a pleading is the determination of how much detail is necessary to give adequate notice to an adverse party and enable him to prepare a responsive pleading,

Id., quoting Windsor Assoc. Inc. Greenfield, 564 F. Supp. 273, 280 (D. Md. 1983).

Numerous courts have recognized that "Where a transaction is more complex or the transactions are numerous and take place over an extended period of time, less specificity is required." Amborsino v. Rodman & Renshaw, Inc., 638 F. Supp. 968, 971 (N.D. Ill. 1986); See also. Wabash Valley Association. Inc. v. Public Service Co. of Indiana, Inc., 678 F. Supp. 757, 762 (S.D. Ind, 1988). Federal Savings & Loan Insurance Corporation v. Shearson American Express Inc., 658 F. Supp. 1331, 1337 (D.P.R. 1987). Maryland courts are in agreement. For example, in Nunes v. Merrill Lynch, Pierce, Fenner & Smith Inc, 609 F. Supp, 1055, 1065 (D. Md. 1985), the court examined a case involving numerous transactions taking place over an extended period of time, and commented that "it serves no useful purpose to require the plaintiffs list with particularity every transaction relevant to their claim". Id., quoting in Baselski v. Paine, Webber. Jackson & Curtiss, Inc., 514 F. Supp. 535, 541 (N.D. Ill. 1981)). In arriving at this determination, the court quoted Windsor Associates, stating that the sufficiency of a pleading is determined by how much detail is necessary to give adequate notice to the adverse party.

Further, numerous courts have also recognized that leis specificity as to the role of each defendant is required where the defendants all "corporate insiders". Thus, "the attribution or specific fraudulent acts to specific defendants is unnecessary where the individual defendants are insiders if, as here, 'the complaint sufficiently describes the fraudulent acts and provides the individual with sufficient information to answer the allegations.'" Uniroyal Goodrich Tire Co. v. Mutual Trading Corp., 749 F. Supp. 869, 872 (N.D. Ill. 1990) (quoting Banowitz v. State Exchange Bank, 600 F. Supp.1466, 1469 (N.D. Ill. 1985)), and cases cited therein. As is clearly alleged in the Complaint the individual Defendants are all corporate insiders. Force is and was Chief Executive Officer and owner of EMS. See Complaint at ¶¶6 and 1O. Rhoades is and was the Engineering Manager at EMS. See Complaint at ¶¶7 and 11. Price was the personal responsible for production and customer services at EMS. See Complaint ¶¶8 and 12. The Complaint further states that all three of the individual Defendants directed or approve of the fraudulent practices recited in the Complaint See ¶¶6 through 8 and ¶¶ 10 through 12.[4]

Given the liberal construction clause of RICO, the seventy-eight specifically detailed instances of fraud occurring over a period of three years, the informal discovery supporting such fraud provided to Defendants, and the fact that Defendants are "corporate insiders", PEPCO has clearly met its burden under Rule 9(b). The EMS Defendants' motion to dismiss with respect to PEPCO's 1962(a) claim should

---

[4] Moreover, further details as to the specific roles of each individual Defendant will be flushed out through discovery.

be denied, as they clearly have been given adequate notice to enable them to prepare an adverse pleading, see Windsor Associates, supra.[5]

3. PEPCO Has Sufficiently Alleged Agreement Among the Defendants Such as to Withstand a Motion to Dismiss.

The EMS Defendants next allege that. PEPCO has failed to state a claim under § 1962(d) against EMS, because PEPCO 'failed to allege that EMS objectively manifested any agreement to participate in a conspiracy." Defendants' Motion to Dismiss, at p. 14. The EMS Defendants apparently concede that PEPCO has alleged an agreement among the individual Defendants.[6]

However, as the EMS Defendants correctly note, PEPCO specifically alleged that "the scheme and artifices ... was arrived by the agreement of the individual Defendants, with and on behalf of the corporate defendant, herein who did agree and

---

[5] Should this Court determine that the incidents of fraud have not been alleged with sufficient particularity, PEPCO seeks leave to amend the Complaint.

[6] Defendants also contend that each of their roles must be specifically delineated with respect to the Section 1962(d) claim. This, however, is the wrong standard. As the court stated in Hecht v. Commerce Clearing House, Inc., 897 F.2d 21, 26 n.4 (2nd Cir. 1990) "Rule 9(b) applies only to fraud or mistake, not to conspiracy. The pleading of a conspiracy, apart from the unde0ying ads of fraud is property measured under the more liberal requirements of Rule 8(a)". See also Rose v. Bartle, 871 F.2d 331, 366 (3rd Cir. 1989); United States v. Gigante, 737 F. Supp. 292, 298 (D.N.J. 1990); and Andreo v. Friedlander, Gaines, Cohen, Rosenthal and Rosenberg, 660 F. Supp. 1362, 1272 (D. Conn. 1987).

conspire among themselves to implement the aforesaid scheme and artifices." Complaint at ¶114. Furthermore, in paragraph 20 of the Complaint, PEPCO states that "all of tie actions attributed to EMS were performed under the direction and control of the individual Defendants who agreed and conspired to implement the scheme and artifices." Thus, PEPCO clearly alleges respondent superior liability on the part of EMS. See Morley v. Cohen, 610 F. Supp. 798, 811 (D. Md. 1985) ("the doctrines of respondeat superior and vicarious liability, normally applicable in the criminal realm, are equally applicable in RICO cases whether the remedy sought is criminal or civil") (quoting Heffron Co. v. Seafarers' Maryland Bldg. Corp., No. HAR-83-3724, slip op. at 18. (Md. 1985) (Report and Recommendation of Magistrate Frederic: N. Smalkin)).

Moreover, PEPCO has alleged that the Defendants, including EMS, committed at least seventy-eight acts of fraud in the course of and in developing the enterprise. As the court in United States v. Melton, 689 F.2d 679; 683 (7th 1982) recognized, the agreement necessary for a conspiracy conviction may be inferred from allegations that defendants committed several acts of racketeering in furtherance of the enterprise. See also Pandick v. Rooney, 632 F. Supp. 1430, 1436 (N.D Ill. 1986) (conspiratorial agreement inferred from allegations of racketeering activities in furtherance of enterprise).

The reasonable inference to be drawn from all these allegations, and the Complaint *in toto*, is that all the Defendants, including EMS, agreed to participate in this scheme as alleged by PEPCO. Thus, the EMS Defendants' motion to dismiss with respect to PEPCO's 1962(d) claim as to EMS should be denied.

4. PEPCO Has Sufficiently Alleged Conspiracy Among the Individual and Corporate Defendants.

The EMS Defendants argue that, as a matter of law, EMS could not conspire with the individual Defendants, who are its employees. The Defendants apparently concede however that the individual Defendants could, and that PEPCO has sufficiently alleged that they did, conspire with one another in violation of Section 1962(d).

It is certainly true, as a generally legal principle, a corporation cannot conspire with its own employees or other agents. See, eg., Kairys v. Douglas Desario, Inc., 83 Md. App. 667, 683 (1990). The Fourth Circuit has recognized this principle in RICO cases under West Virginia and Virginia law. See New Beckley Mining Corp. v. International Union. United Mine Workers of America, 18 F.3d 1161, 1164 (4th Cir. 1994); United States v. Computer Sciences Corp.,. 689 F2d 1181, 1190 (4th Cir. 198). However, it has not yet done so with respect to Maryland.

Numerous others courts have recognized an exception to this general principle in the RICO context. In contrast to general conspiracy claims, "Intracorporate conspiracies do threaten RICO's goals of preventing the infiltration of legitimate businesses by racketeers and separating racketeers from their profits." Ashland Oil Inc. v. Arnett, 875 F.2d 1271,1281 (7th Cir. 1989) (citing, Russello v. United States 464 U.S. 16, 26-8 (1983) See also Webster v. Omnitriton International Inc., 79 F.3d 676, 787 (9th 1996) (Court "hold[s] that Section 1962(d) applies to intracorporate conspiracies."); Pandick Inc. v. Rooney, 632 F. Supp.

1430, 1435 (N.D. Ill. 1986) ("prohibiting intracorporate conspiracies which violate Section 1962(a) and (b) would further the legislative purpose of RICO").

Thus in line with the purpose and intent of RICO, EMS can be found to have, and has conspired with its employees to perpetrate a fraudulent enterprise. PEPCO has property alleged EMS' participation in this conspiracy just as it has alleged a conspiracy between and among the individual Defendants. As such, PEPCO has property stated a claim for conspiracy against EMS under § 1962(d) and the EMS Defendants' Motion to Dismiss with respect to this claim should be denied.

IV. CONCLUSION

In their Motion to Dismiss, the EMS Defendants have misstated the applicable law and the clear allegations of PEPCO's complaint PEPCO has more than met the pleadings requirements of the Federal Rules of Civil Procedure, enabling Defendants to respond to the claims. Defendants should be required to so respond and their Motion to Dismiss should be denied.

Furthermore, Defendants should not be permitted to take a 28 U.S. § 1962(b) appeal on the issue of the interpretation of §1962(a) under Busby. This type of appeal does not exist solely for the convenience of defendants who dislike the current state of the law. The Fourth Circuit has spoken on this issue, and its pronouncement remains controlling law.

/s/ _____
James P. Gillece, Jr.

/s/ _____
Fiona W. Ong
McGuire, Woods, Battle
& Boothe LLP
The Blaustein Building
One North Charles Street
Baltimore, Maryland 21201
410-659-4400

Attorneys for Plaintiff
Potomac Electric Power Company

CERTIFICATE OF SERVICE

I, HEREBY CERTIFY that on this 2nd of February, 1999 a copy of the foregoing Response to Defendants Motion to Dismiss Counts I and II of Complaint was mailed, by first class mail, postage prepaid to:

James P. Ulwick, Esquire
Kramon & Graham, PA
One South Street, Suite 2600
Baltimore, Maryland 21202-3201

Paul F. Kemp, Esquire
Catterton, Kemp & Greenberg, PA
Suite 215
200 A Monroe Street
Rockville, Maryland 20850

Bruce L Marcus, Esquire
Marcus & Bonsib
Suite 116
6411 Ivy Lane
Greenbelt, Maryland 20770-1405

Article II, Section 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

Section 1964. Civil remedies

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

1961. Definitions

As used in this chapter –

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511

(relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1588 (relating to peonage and slavery), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in

goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, or (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain.

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

Section 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

(2)

No. 01-961

Supreme Court, U.S.
F I L E D
FEB 6 2002
CLERK

In The Supreme Court of the United States

ELECTRIC MOTOR & SUPPLY, INCORPORATED, RALPH FORCE and CHARLES M. RHODES,

Petitioners,

v.

POTOMAC ELECTRIC POWER COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Brief in Opposition

James P. Gillece, Jr.
Counsel of Record
Robert R. Niccolini
McGUIREWOODS LLP
7 Saint Paul Street, Suite 1000
Baltimore, Maryland 21202
(410) 659-4400

Counsel for Respondent

THE LEX GROUP • 1108 East Main Street • Suite 1400 • Richmond, Virginia 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3660 • www.thelexgroup.com

CORPORATE DISCLOSURE

Respondent Potomac Electric Power Company ("PEPCO") is a publicly held corporation which does not have any parent corporations. There is no publicly held company that owns ten percent (10%) or more of the company's stock.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

ARGUMENT 3

THE PETITION FOR WRIT OF CERTIORARI MUST BE DENIED AS NO FINAL ORDER EXISTS TO SUPPORT THE APPEAL 3

CONCLUSION 7

APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases:

Busby v. Crown Supply, Inc.,
896 F.2d 833 (4th Cir. 1990) 2, 3, 6

Cedric Kushner Promotions, Ltd. v. Don King,
121 S. Ct. 2087 (2001) 2

Cohen v. Beneficial Industrial Loan Corp.,
337 U.S. 541, 69 S. Ct. 1221,
93 L.Ed 1528 (1949) 5, 6

Cunningham v. Hamilton County,
527 U.S. 198, 119 S. Ct. 1915, 1919,
144 L.Ed. 2d 184 (1999) 3, 4

Digital Equipment Corp. v. Desktop Direct, Inc.,
511 U.S. 863, 114 S. Ct. 1992,
128 L.Ed. 2d 842 (1994) 3

Firestone Tire & Rubber Co. v. Risjord,
449 U.S. 368, 101 St. Ct. 669,
66 L.Ed 2d 571 (1981) 4

Johnson v. Jones,
515 U.S. 304, 115 S. Ct. 2152,
132 L.Ed. 2d 238, 244 (1995) 5

Prince v. Hicks,
198 F.3d 607 (6th Cir. 1999) 5

Quackenbush v. Allstate Ins. Co.,
517 U.S. 706, 116 S. Ct. 1712,
135 L.Ed. 2d 1 (1996) 3

Richardson-Merrell, Inc. v. Koller,
472 U.S. 424, 105 S. Ct. 2757,
86 L.Ed. 2d 340 (1985) 3

Roberson v. Mullins,
29 F.3d 132 (4th Cir. 1994) 5, 6

Smith v. Regan,
841 F.2d 28 (2nd Cir. 1988) 5

Spiess v. C. Itoh & Co.,
725 F.2d 970 (5th Cir. 1984) 6

Van Cauwenberghe v. Biard,
486 U.S. 517, 108 S. Ct. 1945,
100 L.Ed. 2d 517 (1988) 5, 6

Statutes:

18 U.S.C. §1962(a) 1

18 U.S.C. §1962(d) 1

28 U.S.C. §1254(1) 3

28 U.S.C. §1291 ..... 3, 5

STATEMENT OF THE CASE

On July 29, 1998, PEPCO filed suit under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1962(a) and (d), alleging that Petitioners had engaged in fraudulent activities in the repair of PEPCO electric motors over a multi-year period. (Petitioner's Appendix ("PA") 35-87). Count II of PEPCO's Complaint alleging violation of 18 U.S.C. §1962(d) was dismissed by the District Court, but the Court denied the Motion to Dismiss as to PEPCO's remaining claim under 18 U.S.C §1962(a), and extensive discovery was thereafter conducted by all parties. (PA 16-17).

On or about September 14, 2000, Petitioners jointly filed their first motion for summary judgment, entitled Motion for Summary Judgment for Lack of Proof of Fraud ("First Summary Judgment Motion"). On or about September 15, 2000, Petitioners then filed a second joint motion for summary judgment based upon an alleged lack of proof of injury by PEPCO ("Second Summary Judgment Motion"). On November 8, 2000, the District Court granted summary judgment in favor of Petitioners based upon their Second Summary Judgment Motion, and did not reach the fraud issues contained in the First Summary Judgment Motion. (PA 18-32).

PEPCO appealed to the Fourth Circuit on December 4, 2000, and Petitioners shortly thereafter cross-appealed based upon the District Court's denial of their motion to dismiss the 18 U.S.C. §1962(a) claim and the failure of the Court to rule upon their First Summary Judgment Motion. On August 10, 2001, the Fourth Circuit affirmed in part and reversed in part the

District Court's ruling on the Second Summary Judgment Motion and remanded the case for further proceedings regarding proof of fraud and the related statute of limitations issues. (PA 1-15).

Petitioners thereafter sought *en banc* review of the Fourth Circuit's decision in Busby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990), based upon the District Court's denial of their Motion to Dismiss. The Fourth Circuit, however, declined to grant such review. (PA 33-34). Petitioners then moved the Fourth Circuit for a stay of its mandate pending their proposed petition for certiorari. On November 2, 2001, the Fourth Circuit denied Petitioners' motion, reasoning "that the Supreme Court's decision in Cedric Kushner Promotions, Ltd. v. Don King, 121 S. Ct. 2087 (2001) has made the decision in Bushby [sic] v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990) rule non-determinative of the outcome in cases of this sort." (Respondent's Appendix ("RA") 27).

Following entry of this Order, the District Court on November 6, 2001, in accordance with its earlier Order following remand by the Fourth Circuit, denied Petitioners' First Summary Judgment Motion and scheduled the matter for a pre-trial conference hearing on December 20, 2001. (RA 22). A pre-trial order was then entered by the District Court on December 20, 2001, and trial has been scheduled to commence on May 28, 2002. (RA 2).

ARGUMENT

THE PETITION FOR WRIT OF CERTIORARI MUST BE DENIED AS NO FINAL ORDER EXISTS TO SUPPORT THE APPEAL

Petitioners claim to seek review of the Fourth Circuit's August 10, 2001 Order affirming in part and reversing in part the District Court's ruling on the Second Summary Judgment Motion, pursuant to 28 U.S.C. §1254 (1). In fact, however, Petitioners seek review of the Fourth Circuit's decision in Busby v. Crown Supply, Inc., review which the three-judge panel Circuit on August 10, 2001, specifically noted could only be conducted *en banc*. (PA 6). Petitioners thus actually seek review by this Court of the Fourth Circuit's October 22, 2001 denial of Petitioner's *en banc* petition, not the Fourth Circuit's August 10, 2001 Order . (PA 33).

Under 28 U.S.C. §1291, the United States Courts of Appeals have jurisdiction over the final orders of the District Courts. As this Court has noted, "we have repeatedly interpreted Section 1291 to mean that an appeal ordinarily will not lie until final judgment has been entered in a case." Cunningham v. Hamilton County, 527 U.S. 198, 203, 119 S. Ct. 1915, 1919, 144 L.Ed. 2d 184 (1999) (citing Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 712, 116 S. Ct. 1712, 135 L.Ed. 2d 1 (1996); Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867, 114 S. Ct. 1992, 128 L.Ed. 2d 842 (1994); and Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 430, 105 S. Ct. 2757, 86 L.Ed. 2d 340 (1985)). A final order is one that "ends the litigation on the merits and leaves nothing for the court to do but to execute the

judgment." Cunningham, 527 U.S. at 204, 119 S. Ct. at 1920 (citations and quotation omitted). The rule of finality and its limits upon the appeal of interlocutory rulings serves several important purposes:

> It emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of avoiding the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which litigation may give rise, from its initiation to entry of judgment. The rule also serves the important purpose of promoting efficient judicial administration.

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374, 101 S. Ct. 669, 673, 66 L.Ed. 2d 571, 578 (1981) (citations and quotation omitted).

Based upon the foregoing precedent, Petitioners request for a writ of certiorari must be denied because no final order exists to support Petitioner's appeal. The Fourth Circuit, on August 10, 2001, overturned the District Court's grant of summary judgment and remanded the case for trial. (PA 1). As a result, no final judgment exists upon which Petitioners might

legitimately base their request for certiorari. To the contrary, in its present procedural posture, Petitioners are actually attempting to appeal the District Court's denial of their motion to dismiss. Such procedural posture renders the petition inappropriate. See Van Cauwenberghe v. Biard, 486 U.S. 517, 527, 108 S. Ct. 1945, 1952, 100 L.Ed. 2d 517 (1988) (finding that the Court of Appeals was correct to conclude that the District Court's denial of petitioners' motion to dismiss was not immediately appealable). See also Smith v. Regan, 841 F.2d 28, 30 (2nd Cir. 1988) (citing, 28 U.S.C. §1291) ("[g]enerally, orders denying motion to dismiss for lack of jurisdiction or for failure to state a claim are not appealable for lack of finality"); Prince v. Hicks, 198 F.3d 607, 609 (6th Cir. 1999) ("[w]e generally lack jurisdiction over a district court's decision not to dismiss a suit for failure to state a claim"); Roberson v. Mullins, 29 F.3d 132, 136 (4th Cir. 1994) ("[t]he district court's ruling denying this motion to dismiss is obviously not a final decision that concludes the litigation").

In Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949), this Court carved out a narrow exception to the final order rule, designated as the collateral order doctrine, pursuant to which a small class of interlocutory orders may be reviewed despite their lack of finality. Under this doctrine, an order may be subject to immediate appeal if it: (1) conclusively determines a disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal. See Johnson v. Jones, 515 U.S. 304, 310, 115 S. Ct. 2152, 2155, 132 L.Ed. 2d 238, 244 (1995).

The present Petition for Writ of Certiorari, however, is clearly not appropriate under the limited collateral order doctrine enunciated in Cohen. First and foremost, the issue of the continued viability of Busby is in no manner effectively unreviewable on appeal. To the contrary, trial in this matter is already scheduled for May of 2002, and Petitioners can easily raise the issue of the injury investment rule on appeal following trial. The issue is thus in no manner effectively unreviewable on appeal. See Van Cauwenberghe, 486 U.S. at 527, 108 S. Ct. at 1952 (noting that the denial of a motion to dismiss for lack of jurisdiction is not an immediately appealable collateral order because the issue "may be effectively vindicated following final judgment").

Second, the issue raised by Petitioners is not completely separate from the merits of the action itself. To the contrary, the question of investment of racketeering proceeds is inextricably tied to factual determinations concerning the occurrence and nature of the fraudulent activities at issue, determinations which can only be properly made by the finder-of-fact at trial. See Van Cauwenberghe, 486 U.S. at 527, 108 S. Ct. at 1953 (noting that the question of the convenience of the forum raised by the denial of a motion to dismiss is not completely separate from the merits of the action, and is thus not a collateral order immediately appealable under Cohen). See also Roberson, 29 F.3d at 136 ("Denying a motion that seeks dismissal on the grounds that Roberson's claim cannot succeed on the merits . . . is not a collateral order reviewable under Cohen . . ."); Spiess v. C. Itoh & Co., 725 F.2d 970, 974 (5th Cir. 1984) (holding that, while the motion to dismiss raised interesting issues of international treaty

interpretation, the motion was not "one completely separate from the merits of the action" as required by the collateral order doctrine, and the denial of the motion was therefore not immediately appealable).

CONCLUSION

For the foregoing reasons, PEPCO respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

James P. Gillece, Jr.
Counsel of Record
Robert R. Niccolini
McGuireWoods LLP
7 St. Paul Street, Suite 1000
Baltimore, MD 21202
(410) 659-4400

Counsel for Respondent
Potomac Electric Power Company

Dated: February 6th , 2002

TABLE OF CONTENTS
Appendix to Brief

Page

Order of
The Honorable Frederick N. Smalkin
Re: Scheduling Trial
entered December 20, 2001 ..... App. 1

Order of
The Honorable Frederick N. Smalkin
Re: Reopening Case, Denying Defendants' Motion for Summary Judgment and Reinstating Pre-Trial Conference
entered November 6, 2001 ..... App. 22

Order ,
United States Court of Appeals
for the Fourth Circuit
Re: Denying Appellees' Motion to Stay Mandate
entered November 2, 2001 ..... App. 26

UNITED STATES COURT
OFFICE OF THE CLERK
DISTRICT OF MARYLAND

12/20/01

Felicia C. Cannon, Clerk
John A. Cerino, Chief Deputy

To: James P Gillece (aty)
Re: Notice of Orders or Judgments
Fed. R. Civ. P. 77(d)

Case Number: 1:98-cv-02519

Instrument Number: 98

Number of pages including cover sheet: 18

If you received an illegible or incomplete fax and your matter is before a **Baltimore** Division District or Magistrate Judge, please contact John Wike in Case Processing & Records, at (410) 962-2600, ext 3247

Parties having matters before a **Greenbelt** Division District or Magistrate Judge are to Contact LuAnn Davis, intake and Docketing Supervisor, at (301) 344-3225.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

POTOMAC ELECTRIC POWER COMPANY
Plaintiffs,

v. **Civil Action No. S 98-2519**

ELECTRIC MOTOR AND SUPPLY, INC., *et al.*,
Defendant

PRETRIAL ORDER
[Entered December 20, 2001]

The parties hereto, through undersigned counsel and pursuant to Rule 106 of the Local Rules of the U.S. District Court for the District of Maryland, hereby jointly file this proposed Pretrial Order.

A. Plaintiff's Brief Statement of Facts and Legal Theories.

1. Facts.

Plaintiff Potomac Electric Power Company ("PEPCO") is a regulated utility company providing electrical power to customers in the greater Washington, D.C. metropolitan area. Defendant Electric Motor and Supply Company, Inc. ("EMS") is an electric motor

Ordered jointly to govern Trial (4 day non-jury) to
Commence Tuesday, May 21st, 2002 at 09:30 a.m.
/s/ JBJ
12/21/2001

repair company located in Altoona, Pennsylvania. Defendant Ralph Force ("Force") is President of EMS, and Defendant Charles Rhodes ("Rhodes") is the Chief Engineer for EMS responsible for overseeing the repair and technical aspects of EMS's work for PEPCO and other customers. From 1985 until 1996, EMS provided motor repair services for hundreds of PEPCO motors as a result of EMS's successful bids on PEPCO's work.

In March of 1994, PEPCO received an anonymous package suggesting that certain of its employees had engaged in fraudulent bid-rigging with certain EMS employees. Based on this anonymous package, PEPCO had one of its security department investigators, Ed Stowe, institute an investigation. Although this investigation initially focused upon alleged bid-rigging and bribes involving PEPCO's employees, the investigation ultimately uncovered EMS's systematically fraudulent repair work on PEPCO motors.

PEPCO had developed a rigorous set of standards for the repair of its electric motors; those standards were among the most demanding in the industry. EMS, through Force and Rhodes, and in order to gain business from PEPCO and profit therefrom, falsely represented to PEPCO that it could and would repair the motors in conformity with the PEPCO standards. EMS then repaired the motors at levels deliberately below the PEPCO standards, and then falsified records to convince PEPCO that the contracts for repairs were fulfilled. EMS fraudulently repaired PEPCO motors on a regular basis for years, and then lied to PEPCO about the repair work actually being performed in its documentation to PEPCO. Specifically, EMS failed to meet PEPCO's specifications

requiring epoxy as the varnish treatment for motors, and that two (2) treatments of Vaccum Pressure Impregnation ("VPI") with epoxy were required. Instead, EMS often used polyester instead of epoxy and provided only a single VPI treatment. In fact, EMS even applied an epoxy coating over the polyester VPI'd motor on occasion in order to make it appear that PEPCO's specifications had been met. In documenting its work to PEPCO, EMS would lie to PEPCO by filling out paperwork, including inspection reports and invoices, that falsely represented that EMS had used epoxy rather than polyester, and that they had performed two (2) VPI treatments when in fact only one had been performed.

In addition, EMS also regularly failed to perform testing on PEPCO's motors as required by PEPCO's specifications. For example, EMS was required to perform polarization index tests for PEPCO motors to confirm the integrity of installation of the motor. The results reported to PEPCO, however, often did not reflect the actual results and sometimes were just flat-out made up by EMS. Likewise, EMS failed to perform surge tests for PEPCO in accordance with PEPCO's specifications, and then lied about the results to PEPCO, as well as lying about the results of AC High-Potential Tests and required electrical calibrations.

Force and Rhodes were not only aware of, but actually controlled and actively participated in these fraudulent repair activities. Thus, EMS, Rhodes and Force engaged in a pattern of fraudulent activity, which created enormous benefit for EMS. Specifically, EMS was able to low-ball on bids to PEPCO in order to obtain the work, but then would not meet PEPCO's high specifications, saving EMS money and damaging

PEPCO by billing PEPCO for services that were not rendered. Profits made from PEPCO were invested by Defendants back into the enterprise to further the business of EMS. Defendants' concealment of their pattern of fraudulent repair of PEPCO motors thus allowed them to continue to receive work from PEPCO and to profit from their wrongdoing, investing that profit back into the enterprise and damaging PEPCO by billing PEPCO for repair services that were not rendered.

2. Legal Theory.

PEPCO seeks recovery under the Racketeer Influenced and Corrupt Practices Act ("RICO"), 18 U.S.C. § 1962(a). PEPCO will show that Defendants derived income from intentionally engaging in fraudulent activities in their subpar repair of PEPCO electric motors and falsified records to cover up such fraudulent activity, then reinvested the income into EMS's business for the continuation of the enterprise. PEPCO will also show that it was injured as a result of Defendants' fraudulent activities . See 18 U.S.C. sec. 1962 (a); Mid Atlantic Telecom, Inc. v. Long Distance Servs., Inc., 18 F.3d 260 (4th Cir. 1994); Busby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990); In re American Honda Motor Co., 958 F.Supp. 1045 (D.Md. 1997).

B. Defendant's Brief Statement of Facts and Legal Theories.

1. Facts.

Defendant EMS is a small, privately owned electric motor repair shop. EMS has been in business since 1956. EMS has one small plant which is located in

a residential neighborhood in Altoona, Pennsylvania. Defendant Ralph Force, the 79 year old President of EMS has worked in the electric motor repair business for five (5) decades. Charles M. Rhodes, is EMS' chief engineer and has been associated with EMS during the entire period relevant to these allegations. Like Mr. Rhodes, most of EMS' employees have been associated with EMS for many years. The physical plant itself has housed the company for many years. Because it has been fortunate enough to have a stable, efficient work force and due its location in a rural area of Pennsylvania, EMS has been favored with a stable, efficient and long tenured work force. The Company's stability and location in an economically favorable environment together with the aged physical plant have contributed to EMS' ability to maintain low overhead. As a consequence EMS has been able to obtain work as a low bidder on many electric motor repair jobs sent to them by customers. EMS' work has consistently met very high quality standards. In the normal course of its work EMS warrants its repairs work for a period of one (1) year. Over its many years of work, EMS has had very few returns. In the instant case, EMS repaired literally hundreds of PEPCO motors over a 14 year period. Critical to the Defendants' case and fatal to Plaintiff's claims is the dispositive fact that despite the scurrilous charges leveled by PEPCO against EMS not a single motor repaired by EMS for PEPCO in the fourteen (14) year period of their business relationship is reported to have failed in service for reasons related to repairs or service provided by EMS. In discovery, PEPCO was unable to identify a single PEPCO motor that had failed prematurely, or for that matter failed at all as a result of any act or omission of EMS.

EMS categorically denies that it defrauded PEPCO in any way or that it failed to adhere to PEPCO specifications. EMS' employees carefully and diligently repaired each of PEPCO's motors in conformity with PEPCO's specifications. In an age when technological advancements have been made in virtually every discipline, the development of and evolution of electric motors has remained relatively stagnant. Electric motors of all shapes, sizes and deigns are fundamentally similar and simple. In, service the motors either work when connected or not. There is no middle ground. If the repair to the motor has not been properly performed the motor will likely not operate at all when tested and/or placed into service. The best proof of the quality of EMS' work is that none of the motors repaired by EMS has failed or required additional maintenance even though the last motor repaired by EMS for PEPCO was fixed in 1996.

While PEPCO has alleged falsified records, EMS denies the allegation. EMS accurately recorded interim test results performed by its workers on the motors using internal worksheets. Final test results were recorded on the forms supplied by PEPCO. Because tests of motors in the EMS shop were conducted at different stages of motor repair, test results do not necessarily coincide. PEPCO's assertion that the final test results were falsified is based on its erroneous belief and lack of understanding that internal test results performed on motors which were not fully assembled should reveal the same test results as the results obtained on fully repaired electric motors. Similarly, PEPCO's assertion that "burn" records and "bake" records were also falsified also demonstrates PEPCO's fundamental misunderstanding of the repair

process. In fact there were duplicate copies of oven tests results in machine repairs files. The reason for duplication of certain records is that the ovens used by EMS which produces each of the records accommodate more than one motor, such that each chart for each oven actually documents reports relating to several motors being "baked" or "burned" simultaneously.

Nor is the fact that EMS' time records sometimes reflects "0.0" hours for work done on the motors, proof of any fraud. All of PEPCO's work was done on a fixed-price basis. EMS workers often multi-task - - working on other motors while the first motor was in being "baked" or "burned" in an oven or VPI tank. In such circumstances, a worker might choose to record time on a second motor. It simply did not matter to EMS workers, how records were done since PEPCO jobs were not billed on a time and materials basis, but rather on the basis of a fixed price.

EMS will demonstrate how the motors were repaired and how the documents were handled. PEPCO will not be able to show that any fraud occurred, much less any form of racketeering.

2. Legal Theories and Issues.

The only issues left on remand relate to liability. In prior rulings this Court found that PEPCO had no actual damages, and the Fourth Circuit has since affirmed that portion of this Court's decision. ("The District Court correctly found that PEPCO adduced no evidence that any motor repaired by EMS failed or had not performed as well due to EMS' claimed fraud." Slip. Op., at 5). The Fourth Circuit remanded the case solely for the purpose of providing PEPCO with an

opportunity to adduce evidence supporting its liability claim and, if so, to make claim for nominal damages. ("Thus, we conclude that the district court erred in granting summary judgment on the basis of inability to prove the amount of damages; if the motors were not repaired according to PEPCO specifications. *Some* amount of damage likely is present, even if PEPCO cannot prove the amount, and a nominal amount of damage is adequate to support liability. Slip. Op. at 8. Emphasis in original.) In this regard, it is worth noting that PEPCO admitted to the Fourth Circuit in oral argument that it had no way to quantify the differences in costs incurred by PEPCO between charges normally paid for repairs made in conformity with PEPCO's specifications and those costs charged by EMS' for alleged non-compliance with specifications. None of the damage exhibits or witnesses identified by PEPCO, (e.g. Mark Sherman), are relevant to the instant proceeding.

By operation of the statute of limitations the time period within which PEPCO must prove its allegations of multiple predicate acts and a pattern of racketeering is from August, 1994 to February, 1996. PEPCO filed its lawsuit on or about until July 29, 1998. This Court has held that, "PEPCO cannot sue for any injuries it claims prior to July 29, 1994." August 30, 2001 Letter to Counsel. Consequently, PEPCO cannot use pre-August, 1994 conduct to prove its claims. Defendants will move to exclude any such evidence.

Defendants understand that PEPCO may seek to introduce evidence of billing disputes EMS may have had with other power companies or customers. These disputes are unrelated to this case and the allegations lodged by PEPCO herein. If admitted, this evidence

will require substantial rebuttal from EMS, resulting in extensive time being spent on such matters which are both collateral and irrelevant to the instant case.

2. **Legal Theories.**

EMS has not violated any of the material provisions of its contract with PEPCO. PEPCO cannot and has not demonstrated that EMS engaged in any wrongdoing, intentionally or otherwise. PEPCO has alleged that EMS's conduct included "Sub par repair" of PEPCO electric motors, an assertion which has absolutely no factual predicate. From the inception of its case PEPCO has demonstrated an astounding level of misunderstanding and lack of familiarity with the repair process. Not a single PEPCO employee involved in the maintenance repair or power generation component of PEPCO's work has identified a single instance in over ten (10) years of association with EMS whenever EMS work failed to meet expectations or specifications.

C. **Counterclaim, Crossclaim or Third-Party Claim.**

No counterclaims, crossclaims or third-party claims have been filed in this matter.

D. **Amendments to Pleadings.**

No amendments to the pleadings are required at this time, although the parties reserve their right to amendment pursuant to Rule 15(a)-(b) of the Federal Rules of Civil Procedure.

E. Issues in the Pleadings to be Abandoned.

No issues in the pleadings are being abandoned.

F. Joint Stipulations of Fact.

PEPCO stipulates to all the facts set forth in the Plaintiff's Brief Statement of Facts, supra.

G. Damages Claimed by Plaintiff.

PEPCO seeks equitable relief plus provable actual and/or nominal damages, costs, expenses and attorneys fees in bringing this action under RICO. PEPCO also seeks such other and further relief as the Court or jury may deem just and proper.

H. List of Plaintiff's Exhibits.

1. Affidavit of Edwin W. Stowe dated October 13, 2000
2. Report of Investigation 8/31/94; Bate Stamp #001318
3. Affidavit of Richard Beegle dated October 11, 2000
4. EMS Purchase Order No. SN014892-000-00-EK, dated January 5, 1994
5. EMS letter from Darryl E. Price to PEPCO's Francis Savoy, dated January 3, 1994
6. EMS Electrical Test Data Sheet; Serial No. LY461005, Req. 55440

7. EMS Work Order for No: 50351; from 12/30/93 to 1/6/94
8. EMS Invoice dated 1/17/94; Invoice No. 357351
9. EMS Purchase Order CC822487-000-00EK; dated January 14, 1994
10. EMS letter from Charles M. Rhodes to Mr. Bill Wolters, dated January 10, 1994.
11. EMS Electric Test Data Sheet, Serial No. X323219AZ-EV, Req. 7252
12. EMS Work Order for No: 50392; from 1/10/94 to 1/24/94
13. EMS Invoice dated 1/31/94; Invoice No. 357604
14. EMS Purchase Order No. BK012767-030-00-EK
15. EMS letter from Darryl E. Price to PEPCO's Francis Savoy, dated March 1, 1994
16. EMS Electrical Test Data Sheet; Serial No. DNJ413427 Req. No. 55656
17. EMS Work Order for No: 50700; from 2/18/94 to 4/15/94
18. EMS Invoice dated 4/29/94; Invoice No. 359114
19. EMS Purchase Order No. BK012767040-00-EK, dated July 28, 1994
20. EMS letter from Darryl E. Price to PEPCO's Francis Savoy, dated July 26, 1994
21. EMS Electrical Test Data Sheet; Req. 55911
22. EMS Work Order for No: 51902; from 7/25/94 to 7/28/94

23. EMS Invoice dated 8/12/94; Invoice No. 360790
24. EMS purchase order number BK012767-041-00-EK dated August 5, 1994
25. EMS letter from Darryl E. Price to PEPCO's Francis Savoy, dated August 18, 1994
26. EMS Electrical Test Data Sheet Req. 55929
27. EMS Work Order for 52028 from 8/9/94 to 9/14/94
28. EMS Invoice dated 9/21/94, Invoice No. 361411
29. EMS Purchase Order BK012767-044-00-EK dated September 27, 2994
30. EMS letter from Darryl Price to PEPCO's Richard Kessler dated September 9, 1994.
31. EMS Electrical Test Data Sheet Req. 33795
32. EMS Work Order 52182 from 9/7/94 to 10/26/94
33. EMS Invoice dated 11/2/94 Invoice No. 362097
34. EMS Purchase Order CC824313-000-00-EK dated January 6, 1995
35. EMS letter from Steve Peterman to PEPCO's Betty Johnson dated December 28, 1994
36. EMS Electrical Test Data Sheet indicating other epoxy P.D. George E900 two treatments.
37. EMS Work Order for 52944 from 12/29/94 to 1/10/95

38. EMS Invoice dated 1/13/95, Invoice 362949
39. PEPCO Report of Investigation dated August 31, 1994 signed by Edward W. Stowe
40. Letter from Keith Flohr to Edwin Stowe; Dated December 10, 1999 Re: Examination and Testing of Insulating Polymers
41. PEPCO Property Protection Department Property Receipt
42. Keith W. Flohr Resume
43. Keith W. Flohr record of Court appearances over the last four years
44. Letter from Keith W. Flohr to Edwin Stowe; Dated October 23, 1995; Re: Analysis of Resin: Station C, 3A Boiler Feed Pump, S/N 106481 and attached charts
45. Letter from Keith W. Flohr to Edwin Stowe; Dated January 30, 1996; Re: Examination of Sample of Plastic for Visible Flow of Marks
46. Letter from Keith W. Flohr to Edwin Stowe, Dated October 23, 1995; Re: Analysis of Resin: 4BFD Fan Motor Stator Scraping and attached chart
47. Letter from Keith W. Flohr to Edwin Stowe, Dated October 23, 1996; re: Analysis of Resin: 4AFD Fan Motor Stator Scraping and attached charts.

48. Letter from Keith W. Flohr to Edwin Stowe, Dated April 6, 1995; re: analysis of resin; Circulator Water Pump #2B, EWS 4-5-95 and attached chart.
49. Letter from Keith W. Flohr to Edwin Stowe, Dated March 30, 1995; Analysis of Resin: Circulator Water Pump #1A, SN#1L134511 and attached charts.
50. Letter from Keith W. Flohr to Edwin Stowe, Dated march 30, 1995; Analysis of Resin: Circulator Water Pump #2B, SN 4L34511 and attached charts.
51. Letter from Keith W. Flohr to Edwin Stowe, Dated July 11, 1994, Analysis of Six Varnish Samples. Confirmation of Telephone Report and attached charts and Property Protection Department Property Receipt
52. PEPCO Order Number CC822995-000-00-GG; dated November 2, 1994
53. October 11, 1999 Expert Report of Marc Sherman, including exhibits thereto.
54. All other Inspection Reports and invoices from EMS to PEPCO produced during discover (such as documents to be more specially identified prior to the commencement of trial)
55. All other internal time entry reports of EMS concerning work on PEPCO motors produced during discovery (such documents to be more specifically identified prior to the commencement of trial)
56. All documents identified by Defendants in section I, infra.

I. **Defendants' Exhibit List.**

a. Complete EMS files for repairs made by EMS to P.O. SN014892-000-00-EK

b. Complete EMS files for repairs made by EMS to P.O. CK822487-000-00-EK

c. Complete EMS files for repairs made by EMS to P.O. BK012767-030-00-EK

d. Complete EMS files for repairs made by EMS to P.O. BK012767-040-00-EK

e. Complete EMS files for repairs made by EMS to P.O. BK012767-041-00-EK

f. Complete EMS files for repairs made by EMS to P.O. BK012767-044-00-EK

g. Complete EMS files for repairs made by EMS to P.O. CC824313-000-00-EK

h. Complete EMS files for repairs made by EMS to P.O. CC822995-000-00-EK

i. Calibration Certification for testing performance on EMS equipment from E-I-L Instrument, Inc.

j. Calibration Certification for testing performance on EMS equipment from Transcat

k. Photographs of Plant
   - i. Core tester
   - ii. Surge test
   - iii. VPI
   - iv. Bake Oven (Small)
   - v. Bake Oven (Mid-Size)
   - vi. Bake Oven (Large)
   - vii. "Burn-off" Oven
   - viii. HiPot Testing Area
   - ix. Building
   - x. Office Areas of Building

xi. Files Areas
xii. Various Electric Motors in repair

l. Videotape of Plant and Local Environment
m. EMS firm brochure
n. EMS firm brochure

J. **Plaintiff's Witness List.**

1. **Individuals whom Plaintiff expects to present.**

Edwin W. Stowe
Richard Beegle
Robert Samuelson
Trielok Chand Garg

2. **Individuals whom Plaintiff may call if the need arises.**

Charles Rhodes
Ralph Force
Paul Dick
Darryl Price
Marlene Hapney
Terry Querin
Robert Kelly
Harry Johnston
Robert Blakey
Leonard Nimmerrichter
Elizabeth Johnson
William Wolters
Roland Sabacool
Deborah Davis
Any individuals listed by Defendant in section K, infra.

3. **Expert Witnesses whom Plaintiff expects to or may call.**

Keith W. Flohr (Chemist)
Marc Sherman (Certified Public Accountant and Certified Fraud Examiner)
John Morykon (Defendants' Expert Witness)

K. **Defendants' Witness List.**

1. **Defendants expect to call the following witnesses:**

Charles Rhodes
Paul Dick
Stephen Reese

2. **Defendants may call the following witnesses:**

Trielock Chang Garg
Leonard Nimmerrichter
William Wolters
Elizabeth Johnson
Steven Reese
Defendant reserves the right to call any witness(s) identified by Plaintiff

3. **Expert Witnesses Defendant Expects to or may call:**

John Morykon
Charles M. Rhodes (Designated only to the extent that he will testify about processes and procedures employed by EMS. He will offer testimony based on his training, experience and function. He is not an expert witness as defined by the Federal Rules of Civil Procedures.)
Paul Dick (Designated only to the extent that he will testify about processes and procedures employed by EMS. He will offer testimony based on his training, experience and function. He is not an expert witness as defined by the Federal Rules of Civil Procedures.)
Steven Reese (Designated only to the extent that he will testify about processes and procedures employed by EMS. He will offer testimony based on his training, experience and function. He is not an expert witness as defined by the Federal Rules of Civil Procedures.)

L. **List of Depositions to be Offered into Evidence.**

1. **Plaintiffs.** Plaintiff will offer in their case in chief portions of the depositions of any of the witnesses listed in subsection J or K, supra, in the event those individuals are unavailable for trial.

2. **Defendant.** Defendants will offer in their case in chief, Deposition excerpts from T.C. Garg; Leonard Nimmerrichter; Edwin Stowe; William Wolters; Geroge Unkle and Elizabeth Johnson.

M. Other Pretrial Relief.

The parties do not request any other pretrial relief at this time.

Respectfully Submitted,

/s/ James P. Gillece, Jr.
James P. Gillece, Jr.
Robert R. Niccolini
McGUIREWOODS LLP
7 St. Paul Street
Suite 1000
Baltimore, Maryland 21202
(410) 659-4400
Attorneys for Plaintiff PEPCO

/s/ James P. Ulwick
James P. Ulwick
Kramon & Graham, P.A.
One South Street, Suite 2600
Baltimore, Maryland 21202-3201
Attorney for Defendant Rhodes

/s/ Paul F. Kemp
Paul F. Kemp
Catterton, Kemp & Greenberg, P.A.
200A Monroe Street, Suite 215
Rockville, Maryland 20850
Attorney for Defendant
Electric Motor & Supply, Inc.

/s/ Bruce L. Marcus
Bruce L. Marcus
Marcus & Bonsib
6411 Ivy Lane, Suite 116
Greenbelt, Maryland 20770-1405

Attorney for Defendant Force

SO ORDERED THIS _____ DAY OF DECEMBER 2001.

_____
The Honorable
Frederic N. Smalkin
United States District Court
District of Maryland

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

POTOMAC ELECTRIC POWER CO.

v. Civil No. S 98-2519

ELECTRIC MOTOR AND SUPPLY, INC., *et al.*

ORDER
[Entered: November 6, 2001]

The Court, having been informed that the United States Court of Appeals has declined to stay its mandate pending Supreme Court review, hereby ORDERS, this 6th day of November, 2001:

1. That this case BE, and it hereby IS, REOPENED;
2. That defendant's motion for summary judgment on the ground of insufficient proof of fraud subsequent to the commencement of the limitations period BE, and it hereby IS, DENIED, for the reasons stated in the Court's Letter Order to counsel, dated August 30, 2001, a copy of which is appended hereto and adopted herein;
3. That the pre-trial conference in this matter BE, and it hereby IS, REINSTATED for December 20th, 2001, at 09:30 a.m.; and
4. That the Clerk notify counsel of the entry of this Order

\s\ Frederick N. Smalkin
Frederick N. Smalkin
U.S. District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
FREDERICK N. SMALKIN
UNITED STATES
DISTRICT JUDGE

101 W. LOMBARD STREET
BALTIMORE, MD 21201
(410) 962-3840

August 30th, 2001

LETTER TO COUNSEL

Re: PEPCO v. EMS, Civ. No. S 98-2519

Dear Counsel:

I have now read and considered the supplemental briefs you submitted on the limitations/fraud question left open by the Fourth Circuit in its recent consideration of this case on appeal. No oral hearing will be held.

Upon review, I am of the opinion that, as a matter of law, PEPCO was sufficiently on notice of EMS's alleged fraud as of April 21, 1994, to commence the running of the statute of limitations under the *Klehr* rule. I reach that conclusion based on paragraph 9 of the Stowe/Brain internal report of investigation, dated August 31, 1994, which clearly indicated that Mr. Beegle told PEPCO personnel, on that date, that repairs contracted for by PEPCO were not being performed as per the contract, even detailing the use of polyester *versus* Epoxy VPI, one of the major constituents of the fraudulent practices alleged in the complaint, and pointing out other incidents of non-compliance with

contract specifications by EMS (some in collusion with PEPCO employees) involving "motors for repairs which had not been done even though PEPCO had been billed for the repairs," which is the issue at the heart of the fraud allegations here.

Because the plaintiff was on notice of the fraud from and after April 21, 1994, as defendant has put it in its most recent brief, "PEPCO cannot sue for any injuries it claims EMS caused prior to July 29, 1994, which is four years prior to the filing of the complaint.

My review, however, of the complaint, shows numerous allegations of fraudulent billings after July 29, 1994, and my review of the discovery materials shows sufficient evidence of fraud to generate a triable issue as to the occurrence thereof with regard to a number of specific motors that were repaired after July 29, 1994, each allegedly constituting a predicate act of mail fraud. Specifically, the Beegle testimony and the discrepancies between internal records and billing documents are sufficient evidence in this regard to withstand summary judgment. The Beegle testimony, even though it relates to periods before the expiry of the statute of limitations, is not thereby rendered inadmissible, as it purports to establish a routine habit or practice of the defendant with regard to PEPCO motor repairs. *See* Fed.R.Civ.Evid. 406. The significance of the documentary discrepancies is, as the Fourth Circuit noted, clearly a matter of factual dispute incapable of resolution here.

For the stated reasons, the defendant's motion for summary judgment on the ground of insufficient proof of fraud subsequent to the commencement of the limitations period is hereby denied.

A pre-trial conference will be held on Thursday, December 20, 2001, at 9:30 a.m. In the interim, I wonder if you would confer amongst yourselves to see if reference of this case to a neutral judicial officer for settlement/mediation might be useful.

Although informal in format, this is nonetheless an Order of the Court, and will be so docketed and filed.

Very Truly Yours,

/s/ Frederick N. Smalkin
Frederick N. Smalkin
U.S. District Judge

FNS/fns
cc: Court File - original
Addressees

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-2452(L)
(CA-98-2519-S)

POTOMAC ELECTRIC POWER COMPANY,
Plaintiff-Appellant,

v.

ELECTRIC MOTOR AND SUPPLY, INCORPORATED; RALPH FORCE; CHARLES M. RHODES,
Defendants-Appellees,

and

DARRYL PRICE,
Defendant.

[Entered: November 2, 2001]

ORDER

Appellees/cross-appellants have filed a motion for stay of mandate pending petition for certiorari.

The Court denies the motion. The reason for the denial is that the Supreme Court's decision in Cedric Kushner Promotions, Ltd. v. Don King, 121 S. Ct. 2087 (2001) has made the decision in Bushby v. Crown Supply, Inc., 896 F. 2d 833 (4th Cir. 1990) rule non-determinative of the outcome in cases of this sort.

Entered at the direction of Judge Williams with the concurrence of Judge King and Judge Gregory.

For the Court

/s/ Patricia S. Connor
Patricia S. Connor
CLERK

(3)

No. 01-961

Supreme Court, U.S.
FILED
MAR 1 2
OFFICE OF THE CLERK

In The
Supreme Court of the United States

ELECTRIC MOTOR & SUPPLY, INCORPORATED, RALPH FORCE and CHARLES M. RHODES,

Petitioners,

v.

POTOMAC ELECTRIC POWER COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

James P. Ulwick
Counsel of Record
Laura M.L. Maroldy
KRAMON & GRAHAM, P.A.
One South Street, Suite 2600
Baltimore, Maryland 21202
(410) 752-6030

Counsel for Petitioners

THE LEX GROUP • 1108 East Main Street • Suite 1400 • Richmond, Virginia 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3660 • www.thelexgroup.com

8 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY TO BRIEF IN OPPOSITION 1

TABLE OF AUTHORITIES

Page(s)

Cases:

Aetna Casualty & Sur. Co. v. Flowers,
330 U.S. 464 (1947) 3

Blackledge v. Allison,
431 U.S. 63 (1977) 4

Butz v. Economou,
438 U.S. 478 (1978), on remand,
466 F. Supp. 1351 (S.D.N.Y. 1979), affirmed,
633 F.2d 203 (2d Cir. 1980) 4

California Brewers Ass'n v. Bryant,
444 U.S. 598, rehearing denied,
445 U.S. 973 (1980) 3

Occidental Life Ins. Co. v. EEOC,
432 U.S. 355 (1977) 4

School Bd. of Nassau Cty., Fla. v. Arline,
480 U.S. 273, rehearing denied,
481 U.S. 1024 (1987), on remand,
692 F. Supp. 1286 M.D. Fla. (1988) 3

United Air Lines, Inc. v. McMann,
434 U.S. 192 (1977) 4

United States v. Nixon,
418 U.S. 683 (1974) 2

United States v. Perez,
110 F.3d 265 (5th Cir. 1997) 3

Statutes:

28 U.S.C. § 1254 ..... 1, 4

28 U.S.C. § 1291 2

Other Authorities:

17 C. Wright, A. Miller, & E. Cooper,
Federal Practice & Procedure:
Jurisdiction 2d § 4036
(West Publishing Co. 1988) 1, 2, 3

Petitioners file this Reply to the Brief in Opposition filed by Respondent, Potomac Electric Power Company ("PEPCO"), in response to the Petition for a Writ of Certiorari filed by petitioners, Electric Motor & Supply, Incorporated ("EMS"); Ralph Force; and Charles Rhodes. In that petition, petitioners requested this Court to review the August 10, 2001, decision of a three-judge panel of the United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit"), which entered an order affirming the ruling of the United States District Court for the District of Maryland at Baltimore (the "District Court"). The petition demonstrated that the Fourth Circuit's continued rejection of the "investment injury rule" conflicts with the law in seven circuit courts of appeal. Petitioners also showed that resolution of the issues presented by this case would resolve a second split in the circuit courts on the proper interpretation of the Racketeer-Influenced and Corrupt Organizations Act.

In its Brief in Opposition, respondent, PEPCO, presented no substantive reasons why this Court should not grant certiorari in this case. Instead, PEPCO claims only that certiorari should be denied because, according to it, "no final judgment exists upon which Petitioners might legitimately base their request for certioriari." (Brief in Opposition, at 4-5.) Respondent's position has no merit. There is no final judgment requirement, under 28 U.S.C. § 1254 or elsewhere, for issuance of a writ of certiorari. "[T]here is no requirement that there be a 'final' decision; once a case has come to be in a court of appeals, the Supreme Court may grant certiorari to review interlocutory decisions or procedural rulings, and may even grant review before the court of appeals has taken any action at all." 17 C. Wright, A. Miller, & E. Cooper, Federal

Practice & Procedure: Jurisdiction 2d § 4036, at 10-11 (West Publishing Co. 1988)(hereinafter, "17 Wright & Miller"). "The basic requirement is that the jurisdiction of the court of appeals [was] properly invoked under the general statutory provisions for reviewing a district court" decision in the first instance, as it was in this case. 17 Wright & Miller, at 11.

"The ... question is whether the ... order of the District Court was an appealable order and whether this case was properly 'in' the Court of Appeals when the petition for certiorari was filed in this Court. ... Since the appeal was timely filed and all other procedural requirements were met, the petition is properly before this Court for consideration if the District Court order was final" so as to be appealable to the court of appeals under 28 U.S.C. § 1291. U.S. v. Nixon, 418 U.S. 683, 690 (1974); also see 17 Wright & Miller, at 11, n. 6.

> Once a case has come to be in the court of appeals, there is power to issue certiorari without any limitation akin to the much elaborated and significantly reduced requirement of finality imposed on review of state court judgments. Certiorari may be granted to review decisions that do not dispose of the pending litigation, to examine orders that go merely to procedural steps before the court of appeals, or to decide a case that has not even been considered by the court of appeals.

17 Wright & Miller, at 19.

The basis for this rule is "the Court's ability, as head of a single judicial system, to control the procedure, choice of issues for decision, and final disposition of federal cases... ." Ibid. Consistent with this rationale, "it is clear that issuance of the court of appeals mandate does not defeat the right to petition for certiorari on the ground that the case is no longer in the court of appeals." 17 Wright & Miller, at 19. See, e.g., Aetna Casualty & Sur. Co. v. Flowers, 330 U.S. 464, 467 (1947). See also United States v. Perez, 110 F.3d 265 (5th Cir. 1997). In Perez, the court of appeals mandate issued March 4 and the district court, in compliance with the mandate, dismissed the indictment March 6. On June 3, the government petitioned for certiorari. 110 F.3d at 266. The Perez court cited 17 Wright & Miller, § 4036, among other authority, in noting that "[t]he Supreme Court does not lose jurisdiction because the mandate of the Supreme Court has issued." 110 F.3d at 266, n. 4.

Accordingly, far from being "inappropriate," as respondent claims in its opposition to the petition for a writ, the petition for a writ of certiorari in this case, filed after reversal and remand by the Fourth Circuit, is well-founded and supported by ample precedent. "In a wide range of cases, certiorari has been granted after a court of appeals has disposed of an appeal from a final judgment on terms that require further action in the district court, so that there is no longer any final judgment." 17 Wright & Miller, at 29-30. See, e.g., School Bd. of Nassau Cty., Fla. v. Arline, 480 U.S. 273, rehearing denied, 481 U.S. 1024 (1987), on remand, 692 F.Supp. 1286 M.D. Fla. (1988)(court of appeals reversed dismissal and remanded for further proceedings); California Brewers Ass'n v. Bryant, 444 U.S. 598, rehearing denied, 445 U.S. 973 (1980)(order reversing dismissal and remanding for further proceedings);

Butz v. Economou, 438 U.S. 478 (1978), on remand, 466 F.Supp. 1351 (S.D.N.Y. 1979), affirmed, 633 F.2d 203 (2d Cir. 1980)(the court of appeals had reversed a dismissal based on absolute official immunity, and remanded for further proceedings.); United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977)(the Fourth Circuit had reversed a summary judgment for the defendant and remanded for further proceedings); Occidental Life Ins. Co. v. EEOC, 432 U.S. 355 (1977)(the court of appeals had reversed a grant of summary judgment); Blackledge v. Allison, 431 U.S. 63 (1977) (the court of appeals had reversed dismissal of a petition for habeas corpus, and ordered an evidentiary hearing).

"Review is granted or denied according to a wide range of concerns, some of which bear on the finality of the disposition below, and many of which do not." 17 Wright & Miller, at 32. "Once review has been granted, moreover, the scope of the matters open for decision is approached entirely as a matter of wise judicial administration within a single system of courts; there is no need to wrestle with the problems of defining the appropriate deference to be paid to a separate, if subordinate, sovereign." Id. at 11.

As the procedural history set forth in the petition shows, plaintiff-appellant, PEPCO, appealed from a final judgment of the District Court (the District Court's grant of summary judgment in favor of defendants) and defendants-appellees timely cross-appealed. The case and the matters raised in the petition were unquestionably "in" the court of appeals within the meaning of the 28 U.S.C. § 1254. The Fourth Circuit's reversal and remand for further proceedings therefore does not bar the issuance of a writ of certiorari by this Court.

For the foregoing reasons, and those set forth in the petition, petitioners respectfully request that this Court exercise its discretionary authority and grant their petition for a writ of certiorari to the United States Court of Appeals to the Fourth Circuit.

Respectfully submitted,

James P. Ulwick
Counsel of record
Laura M.L. Maroldy
Kramon & Graham, P.A.
One South Street, Suite 2600
Baltimore, Maryland 21202
(410) 752-6030